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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM 1997

WESTOWNE SHOES, INC.
AND CARL A. BIWER CO.,

Petitioners,

v.

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Westowne, a dealer in Brown's "Naturalizer" line of women's shoes, argued breach of contract, claiming it agreed to modification of the dealership agreement to limit dealers to sell only Naturalizers, in exchange for Brown's agreement to supply a Naturalizer casual shoe; that Westowne performed but Brown breached by failing to supply a merchantable casual shoe and in other respects. The court of appeals incorrectly assumed Westowne was claiming Brown breached its dealership agreement by imposing the exclusivity requirement, and therefore did not address the breach of the modified agreement.

Is a litigant denied its right of appeal when the grounds for appeal, although properly presented, are not addressed by the appellate court?

2. Westowne also pleaded and argued claims of promissory estoppel and misrepresentation supported by the affidavit of its president that it eliminated the competing brands in reliance on Brown's promise to supply a Naturalizer casual shoe and its representations it could do so. The court of appeals found Westowne would have agreed to the modification even without Brown's promise and misrepresentations.

Have lower courts expanded *Celotex*, *Anderson* and *Matsushita*, so that clarification and admonition by the Supreme Court are needed to protect Seventh Amendment rights against unwarranted factfinding in applying Fed. R. Civ. P. 56?

PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties. Neither of the plaintiff-petitioner corporations have parent companies or non-wholly owned subsidiaries. Defendant-respondent Brown Group, Inc., has no parent company and it is the parent company of defendants-respondents, Brown Group Retail, Inc., and Brown Group International, Inc. None of the defendants-respondents have non-wholly owned subsidiaries. The parties designated as Brown Shoe Company, Famous Footwear Company and Wohl Shoe Company are corporate divisions and not separate corporate entities.

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CITATIONS OF REPORTS

Westowne Shoes, Inc. v. Brown Group, Inc., 104 F.3d 994 (7th Cir. 1997).

PETITION FOR WRIT OF CERTIORARI

Westowne Shoes, Inc., and Carl A. Biwer Co. (collectively referred to as "Westowne") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit on January 17, 1997, because the court of appeals departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power and decided important questions in a way that conflicts with relevant decisions of this Court, all within the meaning of Sup. Ct. R. 10(a) and (c).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition was filed on January 17, 1997. It is reprinted in the appendix hereto at App. A at 1-11. By order filed April 7, 1997, the Seventh Circuit denied a petition for rehearing. App. G at 69-70. The appeal to the United States Court of Appeals was from a decision, order and judgment in the United States District Court for the Eastern District of Wisconsin, all dated December 13, 1994. The plaintiffs moved for reconsideration in the district court which was denied by a decision and order dated May 16, 1995. The decision, order

and judgment granting summary judgment and the decision and order denying reconsideration are reprinted in the appendix hereto at App. C at 14-57, App. D at 58-64 and App. E at 65-66.

JURISDICTION

On December 13, 1994 the United States District Court for the Eastern District of Wisconsin issued a decision and order dismissing Westowne's complaint. On May 16, 1995 the district court denied Westowne's motion for reconsideration. Judgment was entered March 19, 1996. Westowne timely appealed to the Seventh Circuit, which affirmed in an opinion and judgment filed January 17, 1997. On March 14, 1997, the Seventh Circuit accepted Westowne's motion for rehearing which was denied on April 7, 1997. This petition is being filed within ninety days of the denial of the motion for rehearing, as extended by Sup. Ct. R. 30.1.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION: ARTICLE VII

"In Suits common at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 56(b), (c) and (e), Federal Rules of Civil Procedure

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Rule 28(a)(3), (4), (5) and (6), Federal Rules of Appellate Procedure

Rule 40(a), Federal Rules of Appellate Procedure

28 U.S.C. § 1291

Wisconsin Statutes Chapter 135

STATEMENT OF THE CASE

A. Statement of Facts

Brown manufactures "Naturalizer" shoes, a line of women's shoes that are principally a dress shoe. App. A at 2. Naturalizers are retailed primarily through a network of dealerships which operate "Naturalizer Specialty Stores." The dealers depend on an "in-stock" program under which Brown maintains large inventories of Naturalizer shoes from which the dealers can immediately replenish their stock. This permits the dealers to offer the complete Naturalizer line without tying up capital in large on-site inventories. App. A at 3.

There were "mutual agreements" between Brown and its dealers under which Brown sold the dealers store front

Naturalizer signs for One Dollar with the dealers agreeing: to purchase and concentrate on selling Naturalizer shoes; to maintain inventories of Naturalizers adequate to represent the line; and to participate in joint advertising to promote the Naturalizer name. Brown agreed not to put another Naturalizer dealership within a competitive radius and that the dealers would have access to the full Naturalizer line and would have first priority on reorders through Brown's in-stock program. App. J at 98-101.

During the 1970's Westowne developed Naturalizer dealerships in shopping malls in a number of Wisconsin communities including Madison, Milwaukee, Appleton and LaCrosse. App. J at 98, 102.

While agreeing to adequately represent Naturalizer, the dealers were free to supplement Naturalizer inventory with outside lines in categories that were needed but were not part of the Naturalizer line. In the early to mid 1980's the demand among Naturalizer customers for "comfort casual" shoes reached a point where they became essential to profitability. Because Naturalizer was void in that classification, dealers typically supplemented their inventory with a comfort casual shoe manufactured by San Antonio Shoe Company ("SAS"). App. J at 103-05.

As the Naturalizer dealerships flourished, a Brown affiliate, Wohl Shoe Company, began acquiring them. App. A at 3. By June 1987 it had acquired approximately half of the Naturalizer specialty stores. App. J at 118-19.

Recognizing its void in the increasingly important comfort casual classification, Brown attempted to develop "knock-offs" or imitations of the three best-selling SAS

comfort casual styles through an experimental "fitted upper program," a manufacture/assembly process in which the upper portion of the shoe was made abroad and imported for attachment to the rest of the shoe. Brown manufacturing and marketing management found the shoes failed quality control tests and did not conform to the samples Brown had made for its dealers and, without disclosing its inability to mass-produce merchantable SAS knock-offs, Brown obtained orders for the shoes from its dealers, including Westowne. App. A at 3; J at 105-11.

On June 11, 1987 Brown sent a letter to all Naturalizer dealers stating that because of a recent focus on product development, its Naturalizer line could offer "a complete and balanced selection across all the major classifications of women's footwear" so that Brown was adopting a policy under which only Naturalizer footwear could be carried in stores identified as Naturalizer specialty stores (the "purity policy") and that "all stores will be in compliance with this policy on or before March 1, 1988." App. J at 107-08.

When Westowne's president, Rudolph Schoenecker, first received Brown's June 11, 1987 letter, he did not believe Brown could then supply literally every classification of women's shoes. However, he had seen samples of and actually ordered Naturalizer's version of SAS comfort casuals in order to compare their customer acceptance with SAS. He was concerned about dropping the SAS line before actual market experience with the Naturalizer knock-offs. App. J at 108-09. However, Brown representatives assured him Brown had produced Naturalizer quality "stitch-for-stitch" versions of the SAS shoes, and that these shoes would be available for timely delivery in a variety of sizes and

colors so that Westowne could safely eliminate SAS shoes. Brown representatives also reiterated the Company's position that if Westowne did not "go pure" by eliminating SAS shoes, Brown would terminate Westowne's dealerships, and that although Westowne would still be able to purchase and sell Naturalizer shoes, it could not operate its stores as Naturalizer specialty stores utilizing the Naturalizer sign. App. J at 109-11, 115-16.

Westowne's Schoenecker avers that had he not been convinced by Brown's assurances and representations it was safe to do so, Westowne would not have eliminated SAS shoes and agreed to purity, and would have pursued its legal remedies. App. J at 111-12. Another option open to Westowne, had it been aware of Brown's problems in producing comfort casual shoes, would have been to continue operating as Naturalizer specialty stores and continuing to carry SAS shoes (like, as Schoenecker later learned, some of the other dealers were doing) until Brown worked out its production problems or forced the issue by suing Westowne to remove its Naturalizer signs. However, believing Brown's representations merchantable Naturalizer comfort casual shoes could and would be timely supplied, Westowne agreed to purity and dropped the SAS line. App. J at 112, 121-23.

Brown's problems in producing comfort casual shoes continued and all styles of the SAS imitations were dropped. App. J at 116, 120. Brown continued to insist that Westowne and most of its other dealers remain pure, although it allowed certain selected dealers to continue to operate as Naturalizer specialty stores while carrying SAS comfort casuals. App. J at 115-16, 121-23. In addition to the problem of having no comfort casual shoes to meet customer demands, Westowne and other dealers, by January

1989, could not get timely reorders of the popular styles of Naturalizer dress shoes. This occurred because Brown allowed the stores it owned through its Wohl Division to preempt the supply of key shoes, exhausting Brown's inventory in these shoes for extended periods. App. A at 3. Brown also made some Naturalizer styles available to its Wohl-operated shoe departments, but not to its independent dealers. Also, the Wohl stores obtained Naturalizers for fifteen percent less than the independent dealers paid. App. J at 118.

After sustaining substantial losses in sales and profit, with Brown's continuing refusal to permit reinstating the SAS line, and after learning Brown was permitting other selected dealers to continue carrying the SAS line, Westowne commenced suit against Brown in the Circuit Court for Waukesha County, Wisconsin. In its complaint Westowne alleged not only its original dealership agreement with Brown which permitted dealers to carry some outside lines, but also the 1987 modification of that agreement under which Westowne and other dealers agreed to go "pure" by eliminating SAS shoes, in exchange for Brown's agreement to supply a merchantable substitute supported by an in-stock program. Westowne alleged Brown breached the modified agreement by failing to supply merchantable comfort casual shoes and that its inability to meet increasing customer demand for these shoes caused substantial losses. Westowne also alleged other breaches including Brown's failure to maintain an in-stock program for its dealers with respect to both classic dress shoes and comfort casual shoes, and its failure to allow Westowne and other independent dealers access to the complete Naturalizer line. Westowne also alleged promissory estoppel based on Brown's promise to supply comfort casual shoes and Westowne's reliance on that

promise to its detriment, and a claim of misrepresentation based on Brown's untrue representation at the time it imposed purity that it could supply merchantable comfort casual shoes and its failure to disclose its difficulties in producing them. App. I at 80-90.

Brown removed the case to the United States District Court for the Eastern District of Wisconsin and moved for summary judgment. Westowne submitted the deposition testimony of the former Brown executive who had developed Brown's dealership network and the affidavit of Westowne's Schoenecker regarding the underlying dealership agreement between Brown and Westowne and the dealership letter agreements regarding the conditions for Westowne's use of the Naturalizer sign, its freedom to sell shoes not in the Naturalizer line, Brown's commitment to maintain "in-stock" support for dealer inventory and Brown's agreement dealers would have access to the entire Naturalizer line. Westowne also submitted evidence of the 1987 amended agreement in which Westowne agreed to go "pure" by eliminating the SAS line in exchange for Brown's agreement to produce and supply three patterns of merchantable Naturalizer comfort casual shoes styled after ("stitch-for-stitch knock-offs" of) corresponding SAS patterns. App. J at 98-109, 119.

In addition to Brown's June 1987 letter requiring purity but assuring dealers Brown could now offer Naturalizer shoes in all major classifications, the record also included Schoenecker's affidavit setting forth the assurances by Brown executives and sales representatives that Brown had produced and could supply Naturalizer "stitch-for-stitch knock-offs" of the three popular SAS comfort casual shoes with "in-stock" support in various colors and sizes so that Westowne could safely eliminate the SAS line. The record

also included written catalogs and price lists and a dealer buying guide specifically identifying the new Naturalizer comfort casuals and stating the time they would be available for delivery. The record also contained Schoenecker's contemporaneous correspondence to Brown and his affidavit showing Westowne agreed to eliminate SAS shoes and that it did so in reliance on Brown's assurances regarding Naturalizer's new comfort casuals. App. J at 108-11.

The record also contained evidence of Brown's undisclosed problems in producing properly fitting comfort casual shoes, Brown's failure to deliver these shoes and the fact that Brown dropped this line entirely. This evidence was in the form of deposition testimony from current and former Brown executives and production and marketing personnel, testimony from other dealers and the testimony and affidavit of Schoenecker. App. A at 3. The record also contained evidence that Brown permitted its company-owned Wohl stores to pre-empt orders on regular Naturalizer patterns which prevented Brown from timely filling the orders and reorders of independent dealers through the "in-stock" support program which had been part of the underlying dealership agreement. App. A at 3. There was also evidence there were Naturalizer styles and patterns that were made available to Brown's Wohl-operated stores that were not offered to Westowne and other independent dealers. App. J at 122.

The district court granted summary judgment dismissing the complaint in its entirety. The court held "the record contains only Schoenecker's statements" as evidence regarding the nature of the business relationship between the parties so that there was insufficient evidence to show a contractual relationship between Brown and Westowne and

that the correspondence and alleged oral conversations failed to supply the definite and certain terms necessary to create a contract. App. C at 21-25. In dismissing the promissory estoppel claim, the court found the promises alleged by Westowne were mere predictions or "expressions of hope" rather than promises and were therefore not actionable, and that since Schoenecker had ordered Naturalizer's new comfort casuals before receiving the purity letter and other assurances alleged, he did not rely on the letter and those assurances. App. C at 25-27. The court further found that Westowne's decision to go pure was a "business decision unrelated to anything Brown might have promised." App. C at 27. In dismissing the misrepresentation claim, the court held Brown was under no duty to disclose to Westowne information regarding Brown's problems in producing comfort casuals. The court also found that Schoenecker's testimony and averments were "not persuasive" and that before he got the purity letter Schoenecker knew whether or not Brown offered a "complete and balanced selection" and had "some knowledge" as to whether the new Naturalizer comfort casual series were "stitch-for-stitch" knock-offs, so that there was no reliance on Brown's representations. App. C at 32.

The court did not address Brown's alleged failure to maintain in-stock support regarding both the comfort casual shoes and classic Naturalizer dress shoes, nor did the court address the alleged failure to offer Westowne and other independent dealers the complete line of Naturalizer shoes. Westowne moved for reconsideration which was denied. App. D at 58-64.

On appeal Westowne raised the issues of whether there were material facts requiring a trial on its breach of

contract, promissory estoppel and misrepresentation claims. App. K at 126-27. In its statement of facts Westowne reviewed the formation of Brown's underlying agreements with Westowne and with other dealers, citing the testimony of the former Brown executive who made the agreements, the averments of Westowne's president and letter agreements contained in the record. App. K at 128-130. This review included Brown's agreement its dealers could carry outside lines in categories in which Brown was void, that in-stock inventory support for the dealers would be maintained and that the dealers would have access to the entire Naturalizer line. *Id.* Westowne also reviewed Brown's adoption of its "purity" policy, its effort to produce SAS-type comfort casual shoes, its undisclosed inability to produce casual shoes that fit through its "fitted upper program" and evidence the shoes did not conform to the samples Brown had made to show its dealers. App. K at 132-33. Westowne then reviewed the evidence of Brown's written and oral representations its new comfort casual shoes were available and that Westowne and other dealers, relying on Brown's representations and samples, ordered Brown's casuals to carry along with and "challenge" the SAS shoes though still able to carry outside lines because the purity requirement had not yet been imposed. App. K at 133. Westowne then reviewed the evidence of the modification of the dealership agreement including Brown's written and oral promises to produce and supply, with "in-stock" support, a merchantable comfort casual shoe in exchange for Westowne's agreement to "go pure" by eliminating SAS shoes, and Westowne's acceptance and agreement to eliminate SAS shoes in exchange for and reliance on Brown's promises. App. K at 133-35. Westowne then reviewed the evidence of the alleged breaches of contract including Brown's failure to supply the comfort casuals and its failure to support Westowne and

other dealers with its in-stock program by allowing its own Wohl-operated stores to deplete inventory in popular dress shoes, making them unavailable to fill the orders and reorders of the independent dealers. App. K at 135-38.

In its brief to the court of appeals Westowne presented a detailed legal and factual analysis attempting to demonstrate the basis on which a jury could find Westowne's dealership agreement with Brown constituted an ongoing, though terminable contractual relationship. App. K at 141-47. Westowne's brief went on to argue and attempt to demonstrate that during the existence of the dealership agreement between Westowne and Brown, the parties agreed to an amendment to the earlier agreement which had permitted dealers to sell shoes in classifications not manufactured by Brown's Naturalizer division as long as the dealers adequately represented the Naturalizer line. Westowne's brief then demonstrated the specific agreement between the parties providing that in exchange for Westowne eliminating SAS shoes Brown would deliver to Westowne, by the following season, Naturalizer versions of the three specific SAS patterns Westowne had been carrying. App. K at 147-51.

Westowne's brief then argued Brown's breach of this agreement by failing to supply merchantable comfort casual shoes and abandoning its effort to develop SAS-type comfort casual shoes that fit. App. K at 152. Westowne also argued Brown's breach of the dealership agreement by failing to provide in-stock support in key shoes. App. K at 153-54.

Westowne's brief went on to review Wisconsin law on promissory estoppel and misrepresentation and reviewed the facts of record in light of that law, attempting to

demonstrate specific promises and representations on which Westowne relied in eliminating SAS shoes and further arguing how Brown's failure to disclose its problems in producing merchantable SAS-type shoes constituted misrepresentation under Wisconsin law. App. K at 154-67.

In its decision, the court of appeals acknowledged the evidence in the record showing Brown failed to supply Westowne with the Naturalizer versions of the shoes it had promised and that Brown failed to support Westowne and the other independent dealers with its "in-stock" program, allocating its available inventory in key Naturalizer dress shoes to its company-owned stores, thus denying the independent dealers access to key Naturalizer shoes when they needed them. App. A at 1-3.

However, the court of appeals assumed Westowne was arguing it had a contractual entitlement to remain a Naturalizer dealer indefinitely and that Brown breached the dealership agreement by imposing purity. App. A at 3-4. The court of appeals did not address the question of whether, under the modified agreement, there was an enforceable contract under which Brown was to supply comfort casual shoes in consideration for Westowne's agreement to eliminate SAS shoes and whether Brown breached that contract by failing to supply the SAS substitutes when Westowne eliminated SAS shoes.

With respect to Westowne's arguments for promissory estoppel and misrepresentation, the court of appeals found Westowne would have gone pure even if Brown had not promised SAS substitutes and regardless of any representations concerning the "SAS knock-offs." App. A at

6-7. Accordingly, the court of appeals affirmed the district court's dismissal of the case.

Westowne petitioned the court of appeals for rehearing on the grounds that the court of appeals misapprehended that the contract breach claimed by Westowne was imposition of the purity program and that Westowne was thus making an untimely claim under the Wisconsin Fair Dealership Law, when, in fact, the claim Westowne had pleaded and consistently argued was a common law contract claim based on Brown's breach of the amended agreement in which Brown promised to supply casual shoes in exchange for Westowne's eliminating the SAS line. App. L at 169, 179. Westowne cited both Seventh Circuit and Wisconsin law stating that even parties to a relationship that is terminable can make mutually enforceable contracts. App. L at 177-79. In petitioning for rehearing, Westowne also made the point the court had not addressed Brown's breaches of its agreements to timely replenish Westowne's Naturalizer inventory through its in-stock program and its failure to offer Westowne access to the complete Naturalizer line. App. L at 179-81.

Regarding the claims of promissory estoppel and misrepresentation, in its petition for rehearing, Westowne explained that the court of appeals' finding Westowne would have gone pure despite Brown's promises and misrepresentations was contrary to the record, specifically the averments of Westowne's president that in the absence of Brown's assurances it had developed and could supply a quality substitute for SAS shoes, or if Brown had disclosed its problems in producing SAS-type comfort casual shoes, Westowne would not have eliminated SAS and gone pure but, rather, would have consulted counsel regarding remedies

or continued as a Naturalizer specialty store operator, but carrying SAS shoes. App. L at 170-71, 181-84. Westowne stated in its petition that the court's affirmance of summary judgment dismissing the promissory estoppel and misrepresentation claims based on the court's incorrect determination Westowne would have gone pure even in the absence of Brown's promises and misrepresentations, constituted an impermissible finding of fact denying Westowne its Seventh Amendment right to a jury trial. App. A at 84.

The court of appeals denied the petition for rehearing without comment. App. G at 69-70.

B. Basis for Federal Jurisdiction.

The district court had diversity and removal jurisdiction under 28 U.S.C. §§ 1332 and 1441. The plaintiffs Westowne Shoes, Inc., and Carl A. Biwer Company are both Wisconsin corporations located at Waukesha, Wisconsin. Defendants Brown Group, Inc., Brown Shoe Company, Famous Footwear Company, Brown Group Retail, Inc., Wohl Shoe Company and Brown Group International, Inc., are all Missouri corporations located at St. Louis, Missouri.

REASONS FOR GRANTING THE WRIT

I. Prescribing the Court of Appeals' Duty to Address and Decide Properly-Raised, Material Issues Is an Important Exercise of This Court's Supervisory Power Needed Here to Prevent Denial of Petitioners' Right of Appeal.

A party aggrieved by a judgment or order of a district court may appeal therefrom as a matter of right. 28 U.S.C. § 1291; Fed. R. App. P. 3(a); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Arizona v. Manypenny*, 451 U.S. 232, 244-45 (1981). In exercising that right the appellant is required to submit a brief containing a statement of the issues presented for review, a statement of facts relevant to those issues with appropriate references to the record, a summary of argument and an argument containing the appellant's contentions on the issues presented with reasons and with citations to authorities and the record relied on. Fed. R. App. P. 28(a)(3), (4), (5) and (6). In addition to raising the issues upon which the appeal is based, the appellant is required to develop those issues in its brief. *Freeman United Coal Min. v. OWCP*, 957 F.2d 302, 305 (7th Cir. 1992).

When the appellant meets these requirements and does properly present and develop the material issues on which its appeal is based, what duty is thereby imposed on the court of appeals? When, in *Freeman*, 957 F.2d at 305, the court stated: ". . . we have no obligation to consider an issue that is merely raised, but not developed in a party's brief," was the court acknowledging, as a corollary, that the court of appeals *has* an obligation to consider an issue that *is* both raised and developed in the appellant's brief? If so, and the

court of appeals does not address a material issue properly raised and developed by appellant, is the appellant denied his right of appeal? These are important questions raised in this petition.

There have been decisions and rulings in this Court and in the court of appeals suggesting that a litigant's right to appeal includes fair consideration of appeal issues properly raised. In *Blackburn v. Alabama*, 354 U.S. 393 (1957), a criminal case, this Court was "uncertain whether petitioner's claim . . . was passed upon by the Court of Appeals of Alabama" and therefore vacated the Alabama court judgment remanding it to that court to "pass upon this claim." In *Barr v. Matteo*, 355 U.S. 171, 172-73 (1957), the Court stated that where a particular defense asserted in that case had been "consistently pressed in the district court and in fact urged in the court of appeals itself," the "broad requirements of judicial power and its proper exercise should lead to consideration of [that] defense. . . ." In *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025-26 (7th Cir. 1988), the Seventh Circuit Court of Appeals reiterated the obligation of the appellant to brief the issues, but acknowledged the court's duty to provide a reasoned explanation for its decision on issues properly before the court.

Review should be granted in this case so that the Court can determine and explain the extent to which consideration of properly raised issues is inherent in the right of appeal and whether this petitioner was denied that right.

A major claim in Westowne's case was for breach of contract. Contrary to the assumptions of both the district court and the court of appeals, Westowne was *not* contending

Brown breached its dealership agreement by imposing "purity" in 1987 and requiring Westowne and Brown's other dealers to eliminate outside lines and sell only Naturalizer shoes as a condition of remaining Naturalizer dealers operating under the Naturalizer sign. Westowne's claim in this case did not challenge Brown's right to impose conditions for operating as a dealer or even its right to terminate dealerships. Westowne's claim was this: Under the original agreements between Brown and its dealers, prior to 1987, dealers were permitted to carry non-Naturalizer shoes in classifications not manufactured by Brown, provided the dealers adequately represented the Naturalizer shoes Brown did offer. Thus, Westowne, like other dealers, carried SAS comfort casual shoes because, due to high customer demand, these shoes were becoming increasingly important to dealer volume and profitability. In 1987 Brown's Naturalizer division decided to capture the comfort casual business it was losing to manufacturers such as SAS. Brown attempted to produce imitations or "knock-offs" of three styles of SAS shoes and represented to its dealers it had successfully done so. Brown then informed Westowne and its other dealers of a modification of the existing dealership agreement under which the dealers would be required to eliminate outside lines such as SAS and carry only Naturalizer shoes, and, in exchange for their agreement to do so, Brown would supply Westowne and other dealers with merchantable Naturalizer comfort casual shoes which were "stitch-for-stitch knock-offs" of the SAS patterns the dealers had been relying on. Westowne accepted this modification and agreed to eliminate SAS shoes by the proposed deadline in reliance on Brown's commitment to supply it with the specific Naturalizer versions of the SAS patterns identified in the catalogs, price lists and samples presented to Westowne by Brown. Brown breached this modified agreement by

failing to supply Westowne and other dealers with comfort casual shoes and abandoning its effort to produce them. This breach caused substantial damage to Westowne because Brown, though failing to supply comfort casual shoes which were so critical to dealer volume, refused to permit Westowne to reinstate SAS shoes and insisted on "purity" as a condition of remaining a dealer under the Naturalizer sign. In addition to Brown's failure to supply comfort casual shoes as a breach of the modified agreement, Westowne also alleged and presented evidence showing Brown also breached other terms of the dealership agreement under which Brown had agreed to provide priority "in-stock" support in Naturalizer shoes it did produce so that dealers could rely on timely replenishment of their inventories when Naturalizer shoes were ordered and reordered, and further agreed to offer and make available to the independent dealers the entire Naturalizer line.

These breaches of contract were pleaded and argued in the district court in resisting summary judgment. Aggrieved by the district court's grant of summary judgment and claiming the district court had both misconstrued its claim and impermissibly weighed evidence and found facts against it, Westowne appealed to the United States Court of Appeals. In that appeal Westowne: presented the issue of whether there were material questions of fact requiring a trial of plaintiffs' breach of contract claim; reviewed the facts in the record describing the original dealership agreement and the modification proposed by Brown and accepted by Westowne; and argued the definiteness and enforceability of the agreement modification and Brown's breach, appropriately citing to the record. App. K at 126, 129-38, 140-53.

The court of appeals failed to address the issues central to Westowne's appeal: is there evidence or inferences permitted by that evidence raising material issues of fact on whether there was a modification of the dealership agreement which Brown breached by failing to supply the comfort casual shoes it had promised in exchange for purity? Instead, the court of appeals incorrectly assumed

> Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of losing its Naturalizer dealership . . . or replacing the SAS shoes that it carried with inferior knock-offs. . . Westowne's argument is that the course of dealing between the parties . . . gave Westowne a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose unreasonable conditions on the retention of the dealership, such as requiring the dealer to carry a substandard product.

App. A at 3-4. On this incorrect basis the court assumed Westowne was trying to pursue an untimely claim under the Wisconsin Fair Dealership Law disguised as a breach of contract action. But, as Westowne had argued in both the district court and court of appeals, Westowne's rights, which it could and would have pursued under the Wisconsin Fair Dealership Law had it been timely informed of Brown's decision to abandon its efforts to produce a merchantable comfort casual shoe, are rights that are in *addition* to a

dealer's remedies at common law,[1] such as an action for breach of contract. Thus, although Westowne's claim for breach of the modified dealership agreement was properly pleaded and presented both in the district court and the court of appeals, it was not addressed. Nor did the court of appeals address the other breaches alleged and demonstrated, the claims based on Brown's failure to provide in-stock support and failure to offer Westowne the entire Naturalizer line.

In its petition for rehearing, Westowne attempted to effectively articulate and demonstrate how the court had misapprehended and failed to address its breach of contract claim, citing the portions of the record constituting evidence of the contract and breach Westowne had argued in both the district court and court of appeals. App. L at 169-79. Rehearing was denied without comment. App. G at 69-70. Thus, through no fault of the petitioner, a major issue presented for review was not addressed and petitioner's right to appeal was, in effect, denied.

II. The Court of Appeals' Impermissible Factfinding, Denying Petitioners' Right to a Jury Trial on Their Promissory Estoppel and Misrepresentation Claims, Substantially Departed from the Usual Course of Judicial Proceedings and Conflicted with this Court's Guidelines in Summary Judgment Cases.

The decisions of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby,*

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[1] Wisconsin Fair Dealership Law, § 135.025(2)(c), *Wis. Stats.*

Inc., 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), have been referred to as "the Supreme Court's 1986 trilogy of summary judgment cases." JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.50 (3d ed. 1997). As many other courts have done since then, the district court in this case approached Brown's summary judgment motion with a view affected by this Court's language that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action,'" *Celotex Corp.*, 477 U.S. at 327, and that "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48. *See*, district court decision at App. C at 19-20. Despite this Court's language in *Anderson* that

> at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial,

477 U.S. at 249, and that "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *id.* at 255, courts and writers have become concerned that overuse of Fed. R. Civ. P. 56 has, in some instances, infringed upon Seventh Amendment rights and has resulted in meritorious cases being dismissed without benefit of the record being developed at trial. This concern was recently expressed by the Seventh Circuit Court of Appeals

in *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997):

> The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 172 (7th Cir. 1996); *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995); Samuel Issacharoff & George Loewenstein, "Second Thoughts About Summary Judgment," 100 *Yale L.J.* 73, 88-91 (1990). The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified (so far as the Seventh Amendment permits) to bring federal practice closer to the practice in the legal systems of Continental Europe, where there is no hard and fast line between pretrial and trial and where procedure is more summary and informal than in the United States.

Moore cites the concern since "the post-trilogy doctrine of federal summary judgment," that "encouraging increased use of summary judgment through more permissive doctrine" can lead to "more frequent judicial error" and "may eliminate cases that should have gone to trial. . . ." MOORE, ET AL., *supra*. ¶ 56.50. Moore warns that:

Unless judges ruling on summary judgment consistently make assessments of the case that are at least as accurate as the assessments that would result after trial on the merits, the increased use of summary judgment must be regarded as allowing the judicial system to assume more risk of throwing deserving claimants out of court. . . .

To the extent that more disputes are adjudicated by pretrial motion, cases are more frequently decided on a narrower record and by a judge rather than jurors. Although the Seventh Amendment is not violated when a court properly determines that a nonmovant lacks substantial evidence supporting his claim, making this determination via summary judgment rather than directed verdict nonetheless raises concerns related to the Seventh Amendment. A judge taking a case away from the jury at the summary judgment stage does so with less information than the judge doing so at trial or after a verdict. At or after trial, the judge ruling on a Rule 50 motion for judgment as a matter of law has seen not only the information reflected by summary judgment materials but also has actually seen and heard the witnesses, has had documents explained, has experienced full-fledged in-court cross-examination, and knows whether affiants and deponents maintained their stories in the more probing arena of trial.

MOORE, ET AL., ¶ 56.50. Moore finds that what is "Most troubling, . . ." is:

> the tendency of summary judgment proponents to overlook the degree to which decisions on the motion may not only be erroneous but also erratic and sometimes ideologically driven.

In addition to its claim for breach of contract, Westowne alleged promissory estoppel and misrepresentation claims based on Brown's misleading representations and promises that Brown could and would supply merchantable comfort casual shoes to Westowne and Westowne's reliance thereon. App. I at 82-83, 87-90. In its brief to the court of appeals Westowne reviewed extensive evidence in the record of Brown's specific representations it had developed and could supply comfort casual shoes, specific patterns of these shoes Brown promised it would deliver for the following season and Brown's failure to disclose its problems producing these shoes which, under Wisconsin law[2] rendered even expressions by Brown of opinion regarding the quality and availability of the shoes actionable as misrepresentation. App. K at 154-57, 164-65.

The court of appeals did accept as true, for summary judgment purposes, the facts that Brown had told Westowne it would provide the shoes, that they would be quality imitations of the SAS shoes, but that due to Brown's inability to produce them, the shoes turned out to be inferior and unmerchantable. App. A at 3. However, the court affirmed

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[2] *Lundin v. Shimanski*, 124 Wis. 2d 175, 192, 368 N.W.2d 676, 684 (Ct. App. 1985) ("statements of opinion are actionable if the speaker knows of facts incompatible with his opinion").

dismissal of the promissory estoppel and misrepresentation claims because it found, contrary to the record, that Westowne would have "gone pure" even if Brown had not promised merchantable comfort casuals and regardless of its misrepresentations regarding the shoes. App. A at 6-7. In response to the district court's conclusion that because Westowne "could have but chose not to" remove the Naturalizer sign and reintroduce SAS shoes so that going pure was not Westowne's only option, Westowne reviewed for the court of appeals the extensive evidence in the record showing that taking down the Naturalizer sign and giving up its identity as a Naturalizer dealership would have caused Westowne insurmountable losses. App. K at 161-62. Westowne also demonstrated in the court of appeals that if it had not been convinced by Brown it was safe to do so, it would not have agreed to purity or dropped SAS shoes. App. K at 135. Westowne cited the evidence from its president stating:

> Had I remained concerned about Naturalizer's ability to supply us with a quality comfort casual shoe to substitute for the SAS, or had I believed some of the independent dealers would be allowed to continue carrying outside lines while still retaining their dealership and others not, I would not have agreed to purity and would have consulted an attorney to pursue such legal remedies as were available to me.

App. J at 112. The court of appeals' erroneous conclusion and impermissible factfinding is demonstrated by the language in its decision that:

> Yet at the same time [Westowne] argues that it had to go pure because it could not afford to give up the Naturalizer sign. This means that it would have gone pure even if Brown had not promised a perfect substitute. So the promise made no difference. The promise is also the basis for Westowne's claim of misrepresentation and fails for the same reason. Fraud is not actionable without harm. If, as Westowne itself asserts, it would have gone pure to retain its dealership regardless of any representation concerning the SAS knock-offs, those representations caused it no harm. No harm, no tort.

App. A at 6-7. The court's statements Westowne would have gone pure even in the absence of Brown's promises and representations and that "Westowne itself asserts" this, have no basis in and are, in fact, contrary to, the record.

In petitioning the court of appeals for rehearing, Westowne again cited the evidence that in the absence of Brown's promises and representations Westowne would not have eliminated SAS shoes, and urged upon the court that its conclusions and finding the promises and representations made no difference because Westowne would have gone pure in any event constituted impermissible findings of fact denying Westowne a jury trial on relevant issues of fact in violation of Westowne's rights under the Seventh Amendment. App. A at 181-84. As noted above the petition for rehearing was denied without comment.

Whether in granting summary judgment by a district court or in affirming a summary judgment by the court of

appeals, judicial factfinding and denying the nonmovant the benefit of permissible inferences departs "from the accepted and usual course of judicial proceedings" and "conflicts with relevant decisions of this court." Like the district court, the court of appeals may not resolve factual disputes or weigh conflicting evidence. *Weiler v. Household Finance Corp.*, 101 F.3d 519, 523 (7th Cir. 1996). This Court should grant review to preserve the petitioners' right to a jury trial and to remind lower courts that the decisions in *Celotex Corp.*, 477 U.S. at 317, *Anderson*, 477 U.S. at 242, and *Matsushita*, 475 U.S. at 574, should not be read as weakening the prohibition against judicial factfinding.

CONCLUSION

The petitioners' case is yet to be fairly heard. For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM 1997

WESTOWNE SHOES, INC.
AND CARL A. BIWER CO.,

Petitioners,

v.

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 96-1955

WESTOWNE SHOES, INC.
and CARL A. BIWER CO.,

Plaintiffs-Appellants,

v.

BROWN GROUP, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93 C 720 -- **Rudolph T. Randa**, *Judge*

ARGUED OCTOBER 31, 1996--DECIDED JANUARY 17, 1997

Before POSNER, *Chief Judge*, and FLAUM and EVANS, *Circuit Judges*.

POSNER, *Chief Judge*. In this diversity suit based on Wisconsin law, affiliated firms, now defunct, that owned retail shoe stores in Wisconsin and that we shall refer to collectively as "Westowne" fired a blunderbuss full of

charges, mostly based on the common law of contracts but with trademark and antitrust allegations thrown in, against Westowne's former supplier, the Brown Shoe Company of antitrust fame. The district court granted summary judgment for Brown and we must therefore resolve factual disputes as favorably to Westowne as the record permits.

Brown manufactures a popular line of women's dressy shoes under the name "Naturalizer." Beginning in the early 1970s, Brown sold Naturalizers to Westowne for resale. It also licensed Westowne to use the name "Naturalizer" as part of Westowne's trade dress; that is, Westowne was permitted to use the name on its store signs (Brown even furnished the signs) and thus represent the stores to the consuming public as being authorized Naturalizer dealers. Westowne and the other licensees were not forbidden to sell other brands, and Westowne supplemented Naturalizers with women's casual shoes made by the San Antonio Shoe Company, but 80 to 90 percent of the shoes that it sold were Naturalizers.

In 1987 Brown instituted (actually reinstituted, but that is a detail we can ignore) its curiously named "purity" program, the focus of Westowne's wrath. Under this program, any store that wanted to retain "Naturalizer" in its sign, that is, wanted to represent itself as an authorized Naturalizer dealer or Naturalizer specialty store, had to cease selling brands other than Naturalizer. Brown was willing to continue selling Naturalizers to stores that carried other brands, but it required them to delete the word "Naturalizer" from their store signs and gave them a lower priority in the filling of orders.

The problem with "going pure" was that the Naturalizer line was not complete. It had dressy shoes, but not casual ones. So along with or as part of the purity program -- for all we know, it was a principal purpose of the program -- Brown developed a line of women's casual shoes under the Naturalizer label. It told Westowne that these shoes would be "stitch-by-stitch knock-offs" -- that is, perfect imitations -- of the popular SAS shoes. According to testimony that we must accept as true for purposes of this appeal, though without vouching for its truth, Brown's attempt to develop SAS "knock-offs" was a flop. They were so bad that not only was Westowne, which wanted to remain an authorized Naturalizer dealer and therefore stopped buying from SAS and began buying the knock-offs instead, unable to sell them; they also degraded the Naturalizer mark, making it difficult for Westowne to sell even the good Naturalizers -- the original, dressy line -- at a profit. Compounding Westowne's problems, it found it increasingly difficult to obtain the good Naturalizers. Brown has an "in stock" program, under which it maintains a large inventory of shoes from which to restock its dealers, enabling them to minimize their own inventory expense. As part of what Westowne describes as Brown's effort to monopolize the shoe business, Brown was busy buying up retail outlets and allocating all available inventory to them, thus starving independent dealers like Westowne; and it also sold to its own outlets at a lower price. Eventually Westowne went under and, owing Brown a considerable sum for shoes delivered but not paid for, brought this suit.

Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of

losing its Naturalizer dealership (that is, the right to represent its stores as Naturalizer dealers) or replacing the SAS shoes that it carried with inferior knock-offs. The only written contract was the licensing agreement, and it does not bear on this contract claim. Westowne's argument is that the course of dealing between the parties, not any written contract, gave Westowne a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose unreasonable conditions on the retention of the dealership, such as requiring the dealer to carry a substandard product. Westowne points out that the Wisconsin Fair Dealership Law, Wis. Stat. ch. 135, creates such an entitlement. True; but this is not a suit under the dealership act; such a suit would be barred by the act's one-year statute of limitations. Wis. Stat. § 893.93(3)(b). Westowne's argument that the act creates entitlements which can then be enforced by a suit under the common law of contracts, with its six-year statute of limitations, Wis. Stat. § 893.43, is a transparent evasion of the statute of limitations in the dealership act.

The absence of a *written* contract other than the irrelevant licensing agreement and the multitudinous sales contracts, also irrelevant, covering particular shipments of shoes to Westowne's stores is not critical to the common law contract claim, because Brown has not raised a statute of frauds defense. What is critical is the absence of terms. Westowne's principal testified that he had a contract with Brown, but he was unable to answer such questions as, When did the contract start? When or under what conditions does it terminate? Is the "purity" program a violation? Did Brown so far relinquish its rights over its trademark as to

entitle Westowne to sell another manufacturer's shoes from a store that holds itself out to be a Naturalizer dealership? What consideration did Brown receive for this trademark-endangering concession? The common law of contracts does not empower a court to write the parties' contract for them, *Witt v. Realist, Inc.*, 118 N.W.2d 85, 93-94 (Wis. 1962); *Messner Manor Associates v. Wisconsin Housing & Economic Development Authority*, 555 N.W.2d 156, 159 (Wis. App. 1996); *Goldstick v. ICM Realty*, 788 F.2d 456, 461-62 (7th Cir. 1986), but that is what Westowne is asking us to do.

Westowne also argues, however, that by promising it perfect imitations of SAS shoes, Brown induced it to forgo its remedies under the Wisconsin Fair Dealership Law until the statute of limitations ran out. (Under that law, according to Westowne, Brown could not have forced Westowne to give up its Naturalizer dealership just because Westowne insisted on continuing to carry SAS shoes.) Brown should therefore be estopped to -- to what? Westowne is not very clear about this, but the only answer can be -- to plead the statute of limitations in a suit under the dealership law. A defendant who takes steps to prevent the plaintiff from suing within the statute of limitations is equitably estopped to plead it. *Hester v. Williams*, 345 N.W.2d 426, 431 (Wis. 1984); *Poeske v. Estreen*, 198 N.W.2d 625, 628-29 (Wis. 1972); *Bell v. Employers Mutual Casualty Co.*, 541 N.W.2d 824, 834 (Wis. App. 1995); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990); *Tiberi v. CIGNA Corp.*, 89 F.3d 1423, 1429 (10th Cir. 1996). But this principle presupposes a suit to which the statute of limitations has been interposed as a defense, in this case a suit under the

Wisconsin Fair Dealership Act. Westowne has not sued under that act. We do not think it is permitted to recycle the statutory claim that it failed to make as a common law claim of promissory estoppel in which damages are sought, much as in a suit for legal malpractice, for the loss of the statutory claim. That approach would require speculation about what Westowne's remedies under the dealership law might have been had it sued under that law. Unnecessary speculation: unlike a case of legal malpractice, where the suit the lawyer botched is gone forever, a plaintiff who claims that the defendant by promises or otherwise prevented him from bringing a timely suit can bring an untimely suit against that defendant on the identical claim on which the timely suit would have been based. To disguise a statutory claim as a claim for promissory estoppel in an unnecessary effort to beat a statute of limitations is a formula for confusion, and the district court is not required to tolerate it. *Sams v. Untied Food & Commercial Workers Int'l Union*, 866 F.2d 1380, 1385 (11th Cir. 1989).

Westowne makes the alternative argument for promissory estoppel -- an argument happily free from any dependence on the unpleaded dealership law -- that it relied on the promise of the stitch-by-stitch knock-offs by "going pure," that is, by discontinuing its purchases of SAS shoes. Yet at the same time it argues that it had to go pure because it could not afford to give up the Naturalizer sign. This means that it would have gone pure even if Brown had not promised a perfect substitute. So the promise made no difference. The promise is also the basis for Westowne's claim of misrepresentation, and fails for the same reason. Fraud is not actionable without harm. If,a s Westowne itself

asserts, it would have gone pure to retain its dealership, regardless of any representation concerning the SAS knock-offs, those representations caused it no harm. No harm, no tort. *Schicker v. Leick*, 162 N.W.2d 66, 69 (Wis. 1968); *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1372 (7th Cir. 1990) (applying Wisconsin law).

Westowne has other arrows in its quiver. It claims that Brown violated the trademark license by degrading the unsalable knock-offs. While a trademark licensee (at least if he has an exclusive license), as well as the trademark's owner, can sue to protect the trademark from infringement, *G.H. Mumm Champagne v. Eastern Wine Corp.*, 142 F.2d 499, 502 (2d Cir. 1944) (L. Hand, J.); *Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137, 142 (5th Cir. 1972); 1a Jerome Gilson, *Trademark Protection and Practice* § 816[1][b], pp.8-360 to 8-361 (1987), he cannot sue the trademark owner for "infringing" the trademark. *Silverstar Enterprises v. Aday*, 537 F. Supp. 236, 240-41 (S.D. N.Y. 1982). There is no basis in either the federal or the state law of unfair competition for such a claim. The owner can if he wants, unless contractually committed otherwise, abandon the trademark, dilute it, attach it to goods of inferior quality, attach it to completely different goods -- can, in short, take whatever steps he wants to jeopardize or even completely destroy the trademark. When cases speak of the trademark owner's "duty to ensure the consistency of the trademarked good or service," *Gorenstein Enterprises v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989); see also 2 Thomas J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18.14[1], pp. 18-64, 18-66 (1996), they mean

that it is a condition of the continued validity of the trademark, see *id.*, § 18.15, pp. 18-74 to 18-74.1, or a defense to a consumer's claim of having been fooled by the substitution of an inferior good, not that it is a ground for a licensee's being allowed to sue to force the trademark owner to take steps to assure the trademark's continued validity.

We think that Westowne more or less understands all this, and is making solely a contract claim -- that the trademark license obligated Brown to keep the Naturalizer mark up to snuff. A licensor might so promise, but this licensor did not. Westowne is asking us to make such a promise an *implied* term of every trademark licensing agreement, and that would be absurd. It would give licensees comprehensive power over the licensor's business -- in this case power to tell Brown what kind or quality of shoes it can manufacture and sell under the Naturalizer label. Few licensors would agree to that, and there is no evidence that Brown is one of them. The office of implied contractual terms is to save contracting parties costs of negotiations by interpolating terms that they are pretty sure to have agreed to had they thought about the matter, not terms that they would be almost sure to reject; for the interpolation of *such* terms would increase rather than decrease the costs of contracting as parties busied themselves contracting around the interpolated terms. We add that Westowne's trademark claim is inconsistent with its other claims, all of which are premised on the continued potency of the Naturalizer mark.

Last, Westowne has an antitrust claim. It bases this claim -- that Brown impaired competition by conditioning its dealers' use of the Naturalizer mark on their agreeing to

carry the knock-offs, cf. *Jack Walter & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 704-06 (7th Cir. 1984) -- on Wisconsin rather than federal antitrust law. Wis. Stat. ch. 133. Under federal law, the claim could not take one step toward first base, since Westowne is unprepared to show that Brown's effort to confine Naturalizer dealers to shoes made by Brown could have any effect on competition in the shoe business. It could have an effect, maybe, if Naturalizer dealers were the only outlets for SAS shoes in Wisconsin *and* if having a sign outside your store that says "Naturalizer Dealer" is such a valuable asset that you'll replace your SAS shoes with an unmarketable substitute. Neither condition is plausible, and concerning the first there is not a shred of evidence -- not even the self-serving testimony of Westowne's principal, which is the only evidence for the second condition, the immense value of the Naturalizer mark that Brown with extreme perversity is (according to Westowne) doing its best to destroy.

Westowne's hope is that Wisconsin antitrust law is more archaic than federal. Since there is much more federal than state antitrust litigation, a state antitrust case is more likely to remain unrevisited by the court that rendered it and therefore untouched by the winds of change that have been blowing through the antitrust fields in recent decades than a federal antitrust case. Westowne relies on what it hopes is such a case, *Johnson v. Shell Oil Co.*, 80 N.W.2d 426 (Wis. 1957). The defendant refused to allow its dealers to use the Shell trademark in conjunction with the gasoline of its competitors, but did allow them to sell that gasoline from other pumps on its premises, pumps not labeled "Shell." The Supreme Court of Wisconsin held that this arrangement

did *not* violate the state's antitrust law. The holding is obviously of no value to Westowne -- in fact is adverse to it -- but Westowne likes the standard used by the court -- a "partial restraint of trade, where effected for a proper purpose and limited in time and scope and otherwise reasonable[, is] not invalid." *Id.* at 429. This is the same test that is used for covenants not to compete found in contracts for the sale of a business and in employment contracts. It is a part of the common law of restraint of trade rather than of statutory antitrust law, but *Johnson* borrowed it for use in interpreting the state's antitrust statute, as had an earlier case, *Ruhland v. King*, 143 N.W. 681 (Wis. 1913). Westowne argues that Brown had an improper, namely an anticompetitive, purpose in forbidding its Naturalizer dealers to carry its competitors' brands, failed to limit the prohibition in time or scope, and, especially considering the lousy quality of the SAS knock-offs, acted unreasonably.

The *Johnson* case is 40 years old, and *Ruhland* far older, and since then the Supreme Court of Wisconsin has ruled that the decision of the federal courts interpreting federal antitrust law shall control the interpretation of Wisconsin's antitrust law. *Grams v. Boss*, 294 N.W.2d 473, 480 (Wis. 1980); *Ford Motor Co. v. Lyons*, 405 N.W.2d 354, 367 (Wis. App. 1987). But we need not look beyond *Johnson*, because it dooms Westowne's antitrust claim. *Johnson* holds that a supplier is not required to allow his dealers to use his trademark to designate his competitors' products. Such a requirement would diffuse the goodwill associated with his trademark by associating it with a

competitor's product and would jeopardize the trademark by allowing it to stand for products of different quality.

AFFIRMED.

Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois

JUDGMENT -- WITH ORAL ARGUMENT

Date: January 17, 1997

Before: Hon. Richard A. Posner, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

No. 96-1955

WESTOWNE SHOES, INC.
and CARL A. BIWER CO.,

Plaintiffs-Appellants,

v.

BROWN GROUP, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93 C 720 -- **Rudolph T. Randa**, *Judge*

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

United States District Court
Eastern District of Wisconsin

WESTOWNE SHOES, INC., and CARL A. BIWER COMPANY,

Plaintiffs,

v.

Case Number: 93-C-720

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.,

Defendants and Counterclaim Plaintiffs,

v.

BARBARA B. SCHOENECKER and RUDOLPH V. SCHOENECKER,

Counterclaim Defendants.

DECISION AND ORDER

This matter comes before the Court on defendants' (hereinafter, "Brown" or "the Brown Group") motions for summary judgment seeking dismissal of plaintiffs' complaint

in its entirety and for summary judgment on the counterclaim against plaintiffs and counterclaim defendants Barbara B. Schoenecker and Rudolph V. Schoenecker.[1] For the reasons set forth below, defendants' motion for summary judgment on plaintiffs' seven claims is granted and their motion for summary judgment on the counterclaim is denied.

FACTUAL BACKGROUND

Westowne Shoes, Inc. and the Carl A. Biwer Company (plaintiffs") are engaged in the retail shoe business. Both plaintiff corporations are controlled by Rudolph Schoenecker, a counterclaim defendant in this case. The various defendant entities are "engaged in, among other things, the distribution of footwear and related merchandise to retail outlets in various product markets across the nation, including the State of Wisconsin." (Wright Aff. at ¶ 20. For over twenty (20) years, Brown has had a business relationship with plaintiffs. Periodic transactions occurred between the parties whereby Brown sold footwear and other related merchandise to plaintiffs on account. (Wright Aff, at ¶ 4). In addition, plaintiffs received permission to use Brown-owned trademarks. Attached to the complaint are three letters from Brown to Schoenecker indicating the conditions under which plaintiffs could make use of Brown owned trademarks. For example, a 1978 letter provides in pertinent part, "[y]ou have requested permission to use our registered trademarks NATURALIZER and FOOTWORKS in the trade style of your store located in Bayshore Mall

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[1] On occasion, the Schoeneckers will be referred to as the plaintiffs.

Shopping Center...." (Exhibit A). In addition, the letter provides that "use of the trademarks does not affect the right of Brown... or yourself to terminate the sale of NATURALIZER or FOOTWORKS shoes to you at any time either party desires." A 1984 letter regarding a store in the Fox River Mall sets forth essentially the same conditions. (Exhibit A). Over the years, plaintiffs have purchased shoes and other items from Brown and sold them in Naturalizer "specialty stores". Specialty stores are stores which utilized the NATURALIZER trademark in the trade dress (as the sign) of the store. In addition to the Naturalizer brand, plaintiffs carried shoes manufactured by, among others, the San Antonio Shoe Company (SAS").

In June of 1987, Schoenecker received a letter from Brown which indicated their intention " to return to the original Naturalizer Specialty Store standards of purity." (Exhibit B). The letter recited how successful the specialty stores have been and how Naturalizer has "led the industry for a number of years with regard to the funding of advertising and promotion programs that are designed to build awareness for the brand and drive customers into the stores." The very next sentence provides:

> Also, recently there has been a focus on product development to insure that the Naturalizer line offers a complete and balanced selection across all the major classifications of women's footwear.

The letter provides, "[f]or these reasons, we have found it necessary to adopt a policy of carrying only Naturalizer

footwear in stores identified as Naturalizer Specialty stores -- and only a combination Naturalizer/Footworks for those stores identified as Naturalizer/Footworks stores." Finally, the letter sets a deadline of March 1988 for compliance with the so-called "purity" requirement. While Schoenecker argues that removing the Naturalizer sign "was not a viable option" (Response to Proposed Finding of Fact No. 25), it is clear that it was an "option", even if not an economically attractive one. Schoenecker avers that "Brown was insisting that the plaintiffs either accept the purity program or give up their franchises." (Schoenecker Aff. at ¶ 42). Schoenecker's assertion that he did not have a choice because the "franchise" would have been terminated is not persuasive. Plaintiffs argue that "termination" meant that "Brown could then set up its own Naturalizer specialty store in the same mall." Plaintiffs' options were clear: (1) remove the sign and be exposed to the rigors of the market place including competition from newly created specialty stores; or (2) maintain the sign, and sell only Naturalizer shoes. Given the name recognition that Naturalizer enjoyed, it may not have been a choice that plaintiffs wanted to make, but it was a choice nevertheless. Accordingly, the Court accepts the Brown Group's PFF No. 25 that plaintiffs were free to sell other brands of shoes (in addition to Naturalizers) if they removed the Naturalizer sign. In September of 1987, after some discussion with Brown officials, Schoenecker decided to go "pure" by removing other brands and maintaining the Naturalizer sign over his stores.[2]

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[2] While there is some disagreement about whether the plaintiffs were in total compliance with the purity requirement (PFF No. 33), there is no real dispute that plaintiffs attempted to substantially comply.

In a letter dated September 18, 1987, after stating that the spring 1988 line looked "sensational", Schoenecker registered his concern that he was "taking the SAS shoes out of [the] stores hoping to replace them with naturalizers and this is not happening." (Exhibit C). Over the next number of years, plaintiffs experienced decreased sales and in fact, closed a number of stores. Plaintiffs allege that their losses were the result of the purity program and the Brown Group's failure to fulfill certain promises to supply "stitch for stitch" knock-offs for the SAS shoes that had been dropped. The response of the Brown Group suggests that plaintiffs' business losses were the result of poor management, a market-wide decrease in retail sales, and increased competition from discount malls and department store shoe departments.

While the parties disagree over the cause of plaintiffs' losses, it is an undisputed fact that by early 1993, plaintiffs were indebted to Brown in the amount of $367,900.00. (Brown's PFF No. 9).[3] In an effort to resolve this outstanding debt and maintain business dealings, Westowne, on June 11, 1993, pledged a promissory note ("Note") to the Brown Group. The Note was intended to evidence and establish the terms of repayment for the outstanding indebtedness. (Schoenecker Dep. (Vol 4) at 4; Wright Aff. at ¶ 9). Three days before this Note was signed (6/8/93), the plaintiffs, unbeknownst to Brown, filed the instant suit in

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[3] While plaintiffs "dispute" Brown's PFF No. 9 concerning their indebtedness, they can not quarrel with the plain face of the promissory note which reflects that amount. Whether it was the result of Brown's alleged wrongdoing or not, the "fact" of their indebtedness is certain.

Waukesha County Circuit Court alleging causes of action for: (1) breach of contract; (2) promissory estoppel; (3) negligent and (4) strict responsibility misrepresentation; (5) common law unfair competition; (6) Wisconsin antitrust violations and (7) statutory unfair trade practices.

The Brown Group removed the case to this Court on July 14, 1993 and thereafter filed counterclaims against the plaintiffs and Barbara and Rudolph Schoenecker.

ANALYSIS

A. SUMMARY JUDGMENT.

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact;" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). While a material fact is one that is "outcome determinative under the governing law", Whetstine v. Gates Rubber Co., 895 F.2d 388, 392 (7th Cir. 1990), *a genuine* issue as to that material fact is raised only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The Court must consider "... whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict." (emphasis added) Palucki v. Sears, Roebuck & Company, 879 F.2d 1568, 1573-74 (7th Cir. 1989).

B. THE COMPLAINT

1. Breach of Contract.

Plaintiffs allege that "[t]he dealership relationship under which Brown and the plaintiffs operated for many years was contractual in nature." (opposition at 43). In addition, "[t]he dealership agreement defining that relationship was described in detail by the Brown official who established the Naturalizer franchise system (Lemp) and confirmed by Schoenecker." (Id. at 43-44, citing Brown official Frank Lemp's deposition testimony at 27-29).

Plaintiffs also allege that the June 11, 1987 letter was a "modification" of the contractual agreement under which the plaintiffs operated their Naturalizer Specialty Stores and that "the evidence would support a jury finding of a dealership agreement which was amended in 1987 and breached in at least five respects." (opposition at 45). The allegations of the complaint are that Brown: "(a) failed to supply casual Naturalizer shoes of the kind and quality promised; (b) made erratic and unpredictable deliveries; (c) supplied Naturalizer shoes that were illfitting (sic), poorly made and in other respects of poor quality; (d) failed to sell shoes to plaintiffs at true wholesale prices, and in fact charged plaintiffs a higher price than it did Wohl, Brown Retail and Famous Footwear (Brown entities); (e) failed to make available to plaintiffs the entire Naturalizer line; and (f) cheapened the Naturalizer tradename, label, and trademark by attaching them to poor quality, cheap shoes; and (g) other misconduct." (Complaint at ¶ 17)

"To be enforceable a contract must be definite and certain as to its basic terms and requirements. It must spell out the essential commitments and the obligations of each party with reasonable certainty." Witt v. Realist, Inc., 18 Wis. 2d 282, 118 N.W.2d 85, 93 (1962). "The intent of the parties [to be bound] must necessarily be derived from a consideration of their words, written and oral, and their actions. "Skycom Corporation v. Telstar Corporation, 813 F.2d 810, 814 (7th Cir. 1987), citing Household Utilities, Inc. v. Andrews Co., 71 Wis. 2d 17, 236 N.W.2d 663,669 (1976). Finally, an offer must be so definite in its terms and require such definite terms of acceptance that the promises and performances required of each party are reasonably

certain. Farnsworth, McKoane & Co. v. North Shore Savings & Loan Assoc., 504 F.Supp. 673, 676 (E.D.Wis. 1981)(Reynolds, J.), citing Goebel v. National Exchangors, Inc., 88 Wis. 2d 596, 277 N.W.2d 755 (1979).

Plaintiffs locate the contractual promises in the "underlying contractual nature of the dealership relationship between [Brown] and the plaintiffs." (opposition at 46). Plaintiffs argue that there was contract "definiteness" to the point of "precision: Brown promised to provide the plaintiffs with Naturalizer knock-offs that were 'stitch-for-stitch' identical with the SAS shoes." (opposition at 46). This promise was in exchange for the plaintiffs' promise to "go pure." (opposition at 45).

First, even though plaintiffs characterize it as such, there is simply no evidence that a dealership or franchise agreement was contemplated or agreed to by the parties. Plaintiffs nowhere undertake a legal analysis of these respective business forms or demonstrate how the evidence supports a finding that either existed. There are no documents to support this finding and while Frank Lemp ("Lemp") uses the term "dealer", he uses it interchangeably with the phrases "retail outlet" and "retail vehicle." (Lemp Deposition Tr. at 27-29). Plaintiffs have not directed the Court to any portion of Lemp's testimony where he refers to the Specialty stores at "franchisees." In sum, the record contains only Schoenecker's statements and counsel's arguments regarding the nature of the business relationship between the parties. Therefore, the Court agrees with Brown and finds that the parties' relationship was that of vendor/vendee.

Second, the letter itself does not constitute a "contract." None of the terms alleged in the complaint are found therein. The letter constitutes an announcement of new conditions on use of the trademarks NATURALIZER and FOOTWEAR. Consider the following, "[f]or these reasons, we have found it necessary to adopt a policy of carrying only Naturalizer footwear in stores identified as Naturalizer Specialty stores..." The tenor of that sentence is straightforward and there is no hint that plaintiffs have any choice in the decision. (Of course, as discussed elsewhere, plaintiffs had a choice to comply and maintain their use of the Naturalizer sign trademark, or remove the sign, and sell whatever shoes they desired).

Further, the language concerning Brown's "focus on product development to insure that the Naturalizer line offers a complete and balanced selection" is in no way connected to the "purity" policy. This language does not establish a promise made by plaintiffs to go "pure" in exchange for Brown's promise to provide a "complete and balanced selection" of " high quality" Naturalizer shoes. Indeed, the "balanced selection" language is found within a recitation of Brown's leadership in the industry.

In addition, Schoenecker's September 18, 1987 letter is equally "noncontractual":

> I received your letter regarding purity in our Naturalizer stores several months ago. I sent a copy of that letter to all our managers with instructions to eliminate all SAS shoes by March 1, 1988 and told them we would be

> replacing these shoes with the Grenada, Utah, Russett, etc....

Exhibit C, attached to the complaint). While plaintiffs do not so state, presumably this letter represents Schoenecker's "acceptance" of the "contract." But the focus of the letter is Brown's failure to provide an adequate supply of the newly introduced naturalizers and Schoenecker's request for an extension of the purity deadline. For example, Schoenecker writes, "[m]y point is that I am taking the SAS shoes out of our stores hoping to replace them with naturalizers and this is not happening." In sum, there are no "definite terms of acceptance" as required by Farnsworth, supra.

The June 1987 letter was, if anything, a modification of the conditions under which the plaintiffs could use the Brown-owned trademarks. Plaintiffs have offered little or no evidence to support the existence of a contract with the terms they suggest. Beyond Schoenecker's own testimony, the record is devoid of any evidence that Brown agreed to the alleged "terms" that were allegedly "breached". As will be seen below, the alleged oral "stitch for stitch" representations were not "promises" and Brown did not promise or "guarantee" the success of the knock-offs.[4]

There was no "breach" of a contract as neither the letter nor any alleged oral conversations supplied the

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[4] That Schoenecker expected as much is clear from his deposition testimony: "But they never replaced the sales of the SAS shoes, and *the real thing that they never replaced was the profitability*." (emphasis supplied) (Schoenecker Depo. at 165; Plaintiffs' Exhibit 6).

necessary "definite and certain" terms to create a contract in the first instance. Accordingly, plaintiffs' breach of contract claims must be dismissed.

2. Promissory Estoppel.

Plaintiffs allege that Brown assured them that they had developed "stitch for stitch" knock-offs that would "do the job", i.e.; replace the SAS models that they were removing from the specialty stores. These promises were made to induce the plaintiffs to go pure and Brown knew that these assurances were vital to plaintiffs' decision to go pure. (opposition at 71). Schoenecker avers that the "stitch for stitch" "promises" were made in various conversations prior to and subsequent to the purity letter and that they induced him to go pure in September of 1987.

In order to prevail on their promissory estoppel claim, plaintiffs must show that: (1) a promise was made that the promisor should have expected would induce action or forbearance of a definite and substantial character; (2) the promise did induce the required action or forbearance; and (3) injustice can be avoided only be enforcing the promise. Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). A promise is a manifestation of intent and must be judged by an objective standard. Major Mat Co. v. Monsanto Co., 969 F.2d 579, 583 (7th Cir. 1992).

Plaintiffs' promissory estoppel claim fails because Brown's alleged statements do not amount to "a manifestation of intent by the promisor to be bound." Major Mat, supra. While the issue of whether a statement is a

mere prediction or a promise is usually for the jury (Id. at 583), in the case at bar, a reasonable jury could make only one finding - the "stitch-for-stitch" statements were "expressions of hope as to future financial success [rather] than promises to effect that success. "Silberman v. Roethe, 64 Wis. 2d 131, 218 N.W.2d 723, 732 (1974); see also Major Mat, supra at 583 ("mere predictions or statements of opinion are not promises supportive of a promissory estoppel cause of action.") It is certainly possible that Brown officials attempted to reassure Schoenecker that the Granada,[5] Russett, and Utah were capable of supplanting the SAS shoes, but there is no evidence that Brown "promised" their success.

In addition, the alleged "promises", or more precisely, the timing of the alleged promises, undermines the "inducement" requirement. Schoenecker avers that in late 1986 and early 1987 he was approached by Pinson (of Brown) who showed him the three models (the Granada, Russet and Utah) and , at that time, Pinson represented to Schoenecker that they were "stitch for stitch" knock-offs of the SAS shoes. (Schoenecker Aff. at ¶ 30) (emphasis supplied). "Pinson urged me to purchase some of these shoes for our inventories. I decided to do so." (Schoenecker Aff. at ¶ 31). Schoenecker avers that by the time he read the purity letter, "we had *already* made the decision to carry those shoes to challenge the SAS shoes, and as stated above, they were on order." (Schoenecker Aff. at

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[5] While Schoenecker refers to the Grenada shoe, a review of Exhibit 19 indicates that the correct spelling is Granada.

¶ 34) (emphasis added). Therefore, by the time he received the purity letter, Schoenecker had seen the shoes, had ordered them, and had heard the "stitch for stitch" comments. Given this chronology, plaintiffs' argument that Brown's promises "induced them to go pure is undercut. Plaintiffs do not argue, and have presented no evidence, that the shoes ultimately delivered were different in any way from the samples Schoenecker had seen in late 1986 and early 1987. The evidence suggests that Schoenecker's decision to go pure was made with the hope that the knock-offs would replace the loss of the SAS shoes. They apparently did not. But again, the evidence supports only one conclusion - plaintiffs' decision to stay pure was not the result of Brown "promises", but instead a measure of how badly plaintiffs' wanted to keep the Naturalizer sign over their stores.

Finally, equity should not rescue the plaintiffs since, after receiving the allegedly poor quality knock-offs, they could have, but chose not to, remove the sign and reintroduce the more successful SAS shoes. Plaintiffs' repeated argument that this choice was unavailable because their "franchise" would have been terminated has no support in the record. (See page 4, infra). This fact reinforces the conclusion that the plaintiffs' decision to go pure was a business decision unrelated to anything Brown might have promised. Accordingly, plaintiffs' promissory estoppel claim must be dismissed.

3. Negligent and Strict Responsibility Misrepresentation.

Plaintiffs allege that Brown, in the June 11, 1987 letter and "related communications," made representations that "comfort casual shoes with traditional Naturalizer comfort and fit, constituting a reasonable replacement for the SAS casual shoes 'were available and could be provided.'" (opposition at 64, citing the complaint at ¶ ¶ 7,8 and 9). As argued by plaintiffs:

> Brown knew SAS-type comfort casual shoes were needed desperately by Brown's retailers, who could not survive without them, and that dealers therefore would not cave in to Brown's "purity" demand unless assured Naturalizer had an adequate substitute. Brown also knew but did not disclose that its fitted upper program was a disaster and the shoes failed their quality control tests, but simply told the dealers the SAS shoes had been duplicated "stitch for stitch."

(Opposition at 66, citing Schoenecker Aff. at ¶ ¶ 36-40; Brimer, at 17). Wisconsin recognizes three types of misrepresentation: intentional, negligent, and strict responsibility. In order to succeed on a claim for negligent misrepresentation, plaintiffs must show that: (1) there was a duty of care or a voluntary assumption of a duty; (2) the representation must be of fact and made by the defendant; (3) the representation must be untrue; and (4) the plaintiff must believe such representation to be true and rely thereon

to his damage; and (5) the defendant must have failed to exercise ordinary care in making the misrepresentation or in ascertaining the facts. Schweiger v. Loewi & Co., 65 Wis. 2d 56, 221 N.W.2d 882, 887 (1974); Whipp v. Iverson, 43 Wis. 2d 166, 168 N.W.2d 201, 203-204 (1969).

Strict responsibility misrepresentation requires a finding that Brown made a representation based upon personal knowledge or in circumstances in which they necessarily ought to have known the truth or untruth of the statement and the defendant must have an economic interest in the transaction. "Strict responsibility misrepresentation applies in situations where public opinion calls for placing the loss on the innocent defendant rather than on the innocent plaintiff." Badger Pharmacal v. Colgate-Palmolive Co., 1 F.3d 621, 627 (7th Cir. 1993), citing Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804, 808-809 (1983). In addition, while a plaintiff's reliance must be justifiable under strict responsibility misrepresentation, there is no such requirement under negligent misrepresentation. Imark Industries, Inc. v. Arthur Young & Company, 141 Wis. 2d 114, 414 N.W.2d, 57, 64 (Ct.App. 1987); *accord*, Wentzka v. Gellman, 991 F.2d 423, 426 (7th Cir. 1993).

Schoenecker avers that even though he had ordered the Naturalizer knock-offs, "we had not yet received any, and so we had no market experience with them as of that time." He further avers that he received assurances that with the Naturalizer knock-offs, the "corresponding SAS patterns" had been duplicated and that "Naturalizer could support them with a strong in-stock and delivery program so that we need

have no concerns about agreeing to eliminate SAS shoes and going pure." (Schoenecker Aff. at ¶ ¶ 37-38).

As a threshold matter, the rule in Wisconsin is that when two business entities negotiate at arms length, neither owes nor assumes a duty to disclose information to the other. Badger Pharmacal, supra at 627, citing Kanack v. Kremski, 96 Wis. 2d 426, 291 N.W.2d 864, 866-868 (1980). Plaintiffs argue that the debtor-creditor relationship between the parties established a fiduciary "duty" or, at least "a jury issue on whether Brown was a fiduciary." Plaintiffs have cited no authority for this rule which would make a "fiduciary of every vendor who delivers goods on account. Plaintiffs' second argument that "Brown's possession of extensive confidential information and Brown's assertion of control over the dealers by imposition of the purity program" creates a jury question on whether Brown was a "fiduciary" is equally unavailing. (opposition at 66). Simply because Brown may have confidential information, or put conditions on dealers utilizing its trademarks, does not give rise to disclose information.

Even assuming that Brown had a "duty" to disclose, plaintiffs cannot show that Brown's misrepresentations were misrepresentations of fact. "[S]tatements of fact ordinarily must relate to present or preexisting facts, not future ones." Hartwig v. Bitter, 29 Wis. 2d 653, 139 N.W.2d 644, 646 (1996); Consolidated Papers, Inc. v. Dorr-Oliver, Inc., 153 Wis. 2d 589, 451 N.W.2d 456,459 (Ct.App.1989) (expressions of judgment relating to quality are not actionable); Badger Pharmacal, supra at 627, citing Dresser Industries Inc., Waukesha Engine Div. v. Gradall Co., 702

F.Supp. 726, 736 (E.D.Wis.1988) (Warren, J.) ("An unfulfilled promise or statement of future events cannot provide the basis of a misrepresentation claim.") The only present or preexisting facts that Brown allegedly misrepresented were the "complete and balanced" selection of Naturalizers, whether the SAS shoes had been duplicated "stitch-for-stitch," and the status of the "fitted upper program."

As Brown points out, Schoenecker's deposition testimony suggests (although he disputes it - Aff. at ¶ 46) that he did not believe Brown maintained a balanced selection across the major classifications of women's footwear. (reply at 13, Schoenecker deposition (Vol. 11) at 168-169).[6] Essentially, Schoenecker avers that despite his prior testimony, he believed certain representations in *subsequent* conversations that Brown could provide "knock-offs" in accordance with Naturalizer's "high standard of quality and fit." (Schoenecker deposition of 4/21/94 at page 60). Indeed, Schoenecker states that Ed Enslin "guaranteed" the "knock-offs would fit well and be good-selling." (Schoenecker deposition of 4/18/94 at 104-105).

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[6] Q: As of June 11, 1987, ... did you believe that Naturalizer offered a complete and balanced selection across all the major classifications of women's footwear?

A: No

Q: You did not believe that?

A: No, I did not.

Schoenecker deposition, Volume II at 168-169.

With respect to the "complete and balanced selection" representation, Schoenecker's attempt to distance himself from the cited testimony is not persuasive. First Schoenecker does not aver that he was told of particular models that did not exist. Not does he suggest that Brown represented to him that they would manufacture certain shoes and never did. At root, plaintiffs are attempting to craft a misrepresentation claim from the failure of the Granada, Russett, and Utah to profitably replace the SAS shoes that were dropped. In addition, the alleged "stitch-for-stitch" misrepresentation claims are undermined by the fact that Schoenecker had seen samples of the shoes prior to his receipt of the purity letter and thereby would have been able to evaluate whether they were indeed "stitch-for-stitch" knock-offs. These facts together compel only one conclusion - Schoenecker knew whether or not Brown offered a "complete and balanced selection" and he had some knowledge as to whether the Granada, Russett, and Utah were indeed "stitch-for-stitch" knock-offs. See Kanack, supra, 291 N.W.2d at 867 (In claiming misrepresentation, an individual "must exercise reasonable diligence and [can] not close [his] eyes to means of information readily accessible to ascertain the facts.") The only thing Schoenecker didn't know, and neither did Brown, was whether the Naturalizer models would replace the profitability of the SAS models.

Plaintiffs allege that Brown knew its fitted upper program was a "disaster" but failed to disclose this information. The only citation in support of this "fact" is the deposition testimony of Larry Brimer. Plaintiffs cite to - Brimer at 17 - for this proposition, but pages 16-17 are missing from the excerpted deposition. (the Brimer

deposition can be found in Volume III of plaintiffs' exhibits). After reviewing additional portions of Brimer's testimony, there is no support for plaintiffs claim that Brown knew its fitted upper program was a "disaster." Brimer, who is no longer employed by Brown, testified that initial "mother-in-law" surveys produced some good, some fair, and some not-so-good reports which "is not abnormal." (Brimer Depo. at 18). Brimer further testified that at the time of the June 11, 1987 letter, Brown was experiencing "production problems" and that they were trying to "get the kinks worked out of the product". Brimer acknowledged that the shoes were "there,"But they weren't necessarily good quality, fit, along those lines. But we did have product." (Brimer Depo. at 25). In quantifying the production difficulties, Brimer stated, "we probably didn't know to what magnitude at that point [as of June 11, 1987], but we definitely would have known that we were experiencing somewhat of a problem." (Brimer Depo. at 25)

Nowhere does Brimer testify that the fitted upper program was a "disaster" or that production difficulties were concealed from retail dealers. Other comments in the record are those of independent dealers, but not Brown officials. (See opposition at 31-32 containing references to the shoes as "terrible", a "disaster," and "extremely bad.") Brown documents, such as Exhibit 72, show that Brown was aware that "[t]he need for casuals within the line is well known by everyone within Naturalizer and is really a manufacturing issue." But that document is from 1992. It simply does not support the allegation that Brown had knowledge of any relevant "fact" in June of 1987. There is simply no evidence

that Brown, at the time it announced the purity requirement, knew its fitted upper program was a "disaster."[7]

Assuming that plaintiffs could show that Brown owed a duty to disclose, there are simply no facts to support plaintiffs' claims that Brown misrepresented any "fact" that was present or preexisting. Plaintiffs' claims for negligent and strict responsibility misrepresentation must be dismissed.

4. Common Law Unfair Competition.

Plaintiffs allege that Brown extended to its affiliates, Wohl, Brown Retail, and Famous Footwear, preferential pricing and treatment; that Brown engaged in deceptive advertising and debased the Naturalizer trademark by labeling cheap shoes as Naturalizers; and other unspecified unfair competition. Because plaintiffs' discriminatory pricing and preference claims are the focus of their statutory unfair trade claims and because they do not fall within Wisconsin's definition of common law unfair competition, the Court's analysis is limited to the deceptive labeling claims.[8]

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[7] The other alleged statements that plaintiffs label as "facts" are too vague and speculative to support a claim for misrepresentation. The allegation that Ed Enslin "guaranteed" the "knock-offs would fit well and be good-selling is simply not a representation of "fact". Badger Pharmacal infra at 627 ("statements of fact ordinarily must relate to present or preexisting facts, not future ones") citing, Hartwig infra at 646.

[8] The plaintiffs have not elaborated on the "other acts of unfair competition," and therefore they are not before the Court.

Plaintiffs admit that this case presents the "unusual situation" of a "franchisor [who] has a financial incentive to deceive the public as to the quality and consistency of goods marketed under the Naturalizer mark,.... to the injury of the public and its licenses." (opposition at 73-74). In addition, plaintiffs allege that Brown should not be permitted to make a "quick profit at the expense of the licensees by labeling cheap shoes which are mass marketed through discount stores." (Id.) Finally, plaintiffs allege that "franchisees/licensees and customers will suffer from the increasing debasement of the Naturalizer label and associated loss of goodwill..." (Id.) (emphasis added).

Common law unfair competition in Wisconsin involves the misrepresentation or misappropriation of another's product. Desclee & CIE, S.A. v. Nemmers, 190 F.Supp. 381, 386 (E.D.Wis. 1961)(Grubb, J.); Mercury Record Productions, Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163, 218 N.W.2d 705, 709-710 (1974) cert. denied, 420 U.S. 914 (1975) ("[T]he essence of the cause of action in misappropriation is the defendant's use of the plaintiff's product, into which the plaintiff has put time and skill.") Despite plaintiffs' lengthy argument, Brown's practice of labeling allegedly cheap shoes as Naturalizers is not misappropriation or misrepresentation. They are Naturalizer shoes.

In support of their claim here plaintiffs again allege the existence of a franchise without offering legal or evidentiary support. Second, even accepting plaintiffs' argument that Brown would risk the long-term profitability of shoes sold under the Naturalizer trademark for a short-

term financial windfall, Brown is certainly entitled to do so. They own the mark. Despite plaintiffs' argument, Brown is indeed "free to injure or destroy the Naturalizer trademark and goodwill associated with it." The goodwill belongs to Brown, not the retail dealers who sell shoes under that trademark. Simply because plaintiffs have realized significant profit selling shoes with the Naturalizer label does not mean that they can prevent Brown from changing the design or quality of shoes sold under that label.[9]

The notion that customers will "suffer" if a manufacturer debases its trademark is indeed "unusual." While customers may have an interest in not being mislead, they have no guarantee that a product will forever maintain its high quality. Customers who buy the allegedly inferior Naturalizers will of course be disappointed with their purchase, but their "remedy" against Brown is in declining to purchase Naturalizers (of whatever quality) in the future. Plaintiffs cannot escape the fact that the allegedly inferior Naturalizers are nonetheless Naturalizers. Accordingly, their claim for common law unfair competition must be dismissed.

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[9] In this regard, plaintiffs cite numerous trademark cases which hold that licensees have standing to sue for trademark infringement and/or false representation. (opposition brief at 75-76). Those cases say nothing about a licensee suing his licensor for misappropriation or misrepresentation. The only cases which permit the franchisee/licensee to sue the franchisor/licensor are clearly inapposite. Silverstar Enterprises, Inc. v. ADAY, 537 F.Supp. 236 (S.D.N.Y. 1982); A to Z Rental Inc. v. Wison, 413 F.2d 899 (10th Cir. 1969). Both cases permit a franchisee/licensee to sue for breach of a licensing or franchise agreement. Even if plaintiffs were franchisees, this claim is one of misappropriation or misrepresentation, not breach of contract.

5. Wisconsin Antitrust claims.

Wis. Stat. 133.03 **Unlawful contracts; conspiracies**

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal.

Plaintiffs allege that the purity requirement "constituted a contract in restraint of trade and commerce, in violation of Wisconsin Statutes Section 133.03." (Complaint at ¶ 36).[10]

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[10] As a threshold matter, plaintiffs' complaint appears facially deficient under § 133.03 in that it alleges a "contract" or "combination" in restraint of trade solely against Brown. Section 1 of the Sherman Act reaches only concerted activity, not activity which is wholly unilateral. The conduct of a parent corporation and its wholly owned subsidiaries (or unincorporated divisions) is unilateral activity and therefore not assailable under § 1 of the Sherman Act. Copperweld Corporation v. Independence Tube Corporation, 467 U.S. 752 (1984); Ford Motor Company v. Lyons, 137 Wis.2d 397, 405 N.W.2d. 354, 367 (Ct.App. 1987)(applying Copperweld to § 133.03 because "our interpretation of § 133.03 is controlled by federal court decisions under the Sherman Act...") In the case at bar, the allegation of the complain is that "[t]he agreements between the defendants Brown Group/ Brown Shoe Company and the plaintiffs, and particularly the provisions therein relating to the so-called "standard of purity" ...constituted a contract in restraint of trade and commerce..." (Complaint at ¶ 36)(emphasis added). The other named defendants (not mentioned in ¶ 36), are wholly owned subsidiaries or unincorporated divisions. (Brown's brief at 2, n.2; Heier Aff. at ¶ ¶ 4-6). Therefore, even if ¶ 36 of plaintiffs' complaint could be stretched to include these other Brown entities, Copperweld and Lyons appear to preclude the application of § 133.03.

A possible "escape hatch" for plaintiffs was noted by the Seventh Circuit in Will b. Comprehensive Accounting Corp., 776 F.2d 665, 669-670 (7th Cir. 1985)cert. denied,475 U.S. 1129 (1986). In Will, the Seventh Circuit cited

(continued...)

The parties disagree over which methodology the Court should employ in analyzing the antitrust implications of the purity requirement. Plaintiffs' argue that the Court should consider whether the restriction is effected for a proper purpose and limited in time and scope and otherwise reasonable. See e.g., Ruhland v. King, 154 Wis. 545, 546-47, 143 N.W. 681 (1913); Rose v. Gordon, 158 Wis. 414, 149 N.W. 158 (1914); Johnson v. Shell Oil Co., 274 Wis. 375, 80 N.W.2d 426, 429 (1957) citing, Wisconsin Creameries, Inc. v. Sheboygan Dairy Products Co., 208 Wis. 444, 243 N.W. 498 (1932). The Brown Group contends that the Court should follow Wisconsin courts which look to federal antitrust law and apply the "rule-of-reason" to this case. See e.g., Pulp Wood Company v. Green Bay Paper & Fiber Company, 157 Wis. 604, 147

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[10](...continued)

Supreme Court precedent which suggests that a plaintiff may overcome this problem where a franchisor/franchisee relationship exists. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) citing, Albrecht v. Herald Co.,390 U.S. 145, 150, n.6 (1968)(a § 1 claim is pled where a plaintiff "charge[s] a combination between [itself] and [a franchisor] as of the day he unwillingly complied with the restrictive franchise agreements." In Albrecht, an independent carrier of newspapers brought a § 1 retail price fixing suit against the Herald Company, the newspaper publisher. In Albrecht, however there were third parties with whom the Herald Company "combined," i.e.; another independent carrier who took over Albrecht's territory (George Kroner) and a reader solicitation firm (Milne Circulation Sales, Inc.).

In the case at bar, even if the evidence disclosed that a franchise agreement was formed, unlike Albrecht, there is no independent entity (Milne Circulation) or other franchisee (George Kroner) with whom Brown allegedly combined. Accordingly, plaintiffs do not appear entitled to the "escape hatch" mentioned in Will. Nevertheless, because the Brown Group has not raised this issue, the Court must proceed as though plaintiffs have properly alleged concerted, as distinct from unilateral, activity.

N.W. 1058 (1914)(holding that § 1747e (now § 133.03) must be given the same interpretation as Supreme Court opinions construing the Sherman Act); State v. Lewis and Leidersdorf Co., 201 Wis. 543, 549, 230 N.W. 692 (1930)(noting that Pulp Wood "expounded" upon the "rule of reason" adopted by the United States Supreme Court); Reese v. Associated Hospital Service, Inc., 45 Wis.2d 526, 173 N.W. 661 (1970); Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc., 480 F.Supp. 124 (E.D.Wis. 1979) (Warren, J.); Independent Milk Producers Co-op v. Stoffel, 102 EWis.2d 1, 298 N.W.2d 102 (Ct.App. 1980); Grams v. Boss, 97 Wis.2d 332, 294 N.W.2d 473, 480 (1980)(§ 133.01 is a reenactment of the Sherman Act applicable to intrastate activity and is "controlled" by federal court decisions under the Sherman Act.); Ford Motor Company v. Lyons, 137 Wis.2d 397, 405 N.W.2d. 354, 367 (Ct. App. 1987)("our interpretation of § 133.03 is controlled by federal court decisions under the Sherman Act...")

The Plaintiffs antitrust claims must be reviewed under the rule of reason. The " otherwise reasonable" test of Shell Oil is not applicable to the facts and allegations of this case. The most recent Wisconsin case to cite Shell Oil and apply the "otherwise reasonable" test was Reiman Associates, Inc. v. R/A Advertising, Inc., 102 Wis.2d 305, 306 N.W.2d 292 (Ct. App. 1981). The Court of Appeals stated:

> Defendants' reliance on Grams v. Boss, 97 Wis.2d 332, 294 N.W.2d 473 (1980) is misplaced. That case arose under Wisconsin's mini-Sherman Act, sec. 133.01 et seq., Stats., and involved an agreement amounting to a

> conspiracy among defendants to drive the plaintiff out of business. Here, we are concerned with a limited covenant not to compete incidental to the sale of a business entered into freely by the party now complaining and given in exchange for a similar covenant.

(Reiman at 297-298.)

The converse is true in the case at bar. Plaintiffs' have pled a § 133.03 claim and Grams compels the application of the "rule of reason" because this is a "mini-Sherman" case. Wisconsin courts would apply federal antitrust principles to § 133.03 claims such as those presented in the case at bar.[11]

The Restraint of Trade Claim.

Plaintiffs have alleged a *vertical* restraint of trade and its validity must be analyzed under the "rule of reason". Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977); Board of Trade v United States, 246 U.S. 231 (1918). In a rule of reason analysis, the threshold inquiry is

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[11] Even if the Shell Oil test were applied to the case at bar, it is no help to the plaintiffs. While the Wisconsin Supreme Court used the "otherwise reasonable" test plaintiffs ask this Court to adopt, it held that, "[a] restriction...prohibiting the disposing of anything but Shell products under Shell's trade-marks and trade-names...is nonviolative of a statutory provision such as that in question. "Id. at 429 (citation omitted). The same can be said of the facts before this Court.

"whether the defendant ha[s] market power..." Valley Liquors, Inc. v. Renfield Importers, Ltd.,822 F.2d 656, 666 (7th Cir.), cert. denied, 484 U.S. 977 (1987)("Valley II). "Market power is 'normally inferred from the possession of a substantial percentage of the sale in a market carefully defined in terms of both product and geography.'" Id. at 666, citing Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982)("Valley I"). The geographic market is defined as the area in which the defendant competes for consumers' business. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). Product market, or the "line of commerce," must also be determined. Id. Should a plaintiff fail to show that the defendant has market power, "the inquiry is at an end; the practice is lawful." General Leaseways, Inc. v. National Truck Leasin Ass'n, 744 F.2d 588, 596 (7th Cir. 1984); Valley Liquors, ("Valley II" at 666)(only if market power is shown should a court proceed to balance the effects of the vertical restraint on intra/interbrand competition).

Brown argues that the plaintiffs have failed to identify either the relevant product or geographic market and any facts which suggest that Brown enjoys market power. (Brief at 16-17). In addition, plaintiffs' complaint alleges only that the restraining took place in Wisconsin. (Complaint at ¶ 3). In its own analysis, Brown asserts that, in 1986, there were 823 retail shoe outlets in Wisconsin, not including department stores and discount malls. (Corbet Aff. at ¶ 5; PFF No. 29). Only 15 Naturalizer stores were asked to carry Naturalizer brands exclusively. Therefore, the purity requirement affected 1.8% of the total shoe outlets. By 1992, there remained only 10 stores (or 1.4% of the total

shoe outlets) that were affected. (Corbet Aff. at ¶ 6; PFF No. 30).[12] [13]

1. Market Power

Plaintiffs do not dispute Brown's 1.8% or 1.4% calculations, but instead argue that the figures are irrelevant because they do not reflect the relevant market. (Response to Brown's PFF Nos. 29-30; Duncan Declaration ¶ ¶ 4, 9-12; Kormos testimony and charts, Exhibit 94, pp 148-49; Exhibit 96, 18, 22). Plaintiffs argue that they have "given repeated descriptions of the three geographic market[s] and submarkets." (opposition at 61). Plaintiffs describe the

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[12] Plaintiffs' objections to these Proposed Findings of Fact will be discussed below.

[13] As will be discussed infra, plaintiffs' opposition to Brown's analysis of the vertical restraint of trade devolves into an attempt to amend the complaint and proceed on a "tying claim." Plaintiffs do not succeed even if the clain is considered as such. In responding to Brown's restraint of trade analysis, plaintiffs first argue that Grams v. Boss, supra does not require that "market definition be pleaded." (opposition at 61) Plaintiffs' argument misreads Gnms and seems to suggest that this Court should apply Wisconsin's summary judgnent standards. However, Grams explicitly follows the federal "rule of reason" requirement that a plaintiff show market power to succeed on an antitrust claim. Id. at 481. Further, Grams reversed the trial court's grant of summary judgnent which was based on a failure to plead that the "conduct charged had an adverse anticompetitive effect." Id. at 483. In doing so, the Wisconsin Supreme Court applied Wisconsin's pleading and summary judgment standards.

In the case at bar, federal summary judgment standards apply, andthe Brown Group's motion is directed to the merits of plaintiffs' claim. Contrary to plaintiffs' argument, should they fail to "allege facts that give rise to an inference that [Brown] had sufficient market power...," summary judgment nay appropriately be entered. Valley Liquors, ("Valley II") at 666.

markets as: the malls in which each Westowne store competes, a neighborhood surrounding the mall; and a somewhat broader area. (Id.) Plaintiffs further state that:

> [m]arket definition here would also reflect other competitive circumstances in the case, including a product submarket (women's comfort casual shoes), market structure (unique qualities of mall-based specialty stores) and customer definition (mature women, for whom comfort and fit rather than high fashion are the primary buying criteria.)

Id.

Plaintiffs' principal objection to the calculations is that they fail to "differentiate among varying retail outlets, as to whether they are men's and women's shoes, in or not in malls, and numerous other things that make the statistic meaningful." (Plaintiffs' response to Brown's Pff No 29). While plaintiffs fail to cite any case law in support of their argument, the Supreme Court's opinion in Brown Shoe Company v. United States, 370 U.S. 294, 326 (1962), recognized that men's, women's, and children's shoes make up separate "submarkets." The factors considered were: separate manufacturing facilities, public recognition of separate submarkets, peculiar characteristics of each type of shoe, and distinct customer groups. Id. *See also*, Sargent-Welch Scientific Company v. Ventron Corporation, 567 F.2d 701 (7th Cir. 1977) cert. denied, 439 U.S. 822 (1978); Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989).

Brown arrives at the 1.8% and 1.4% figures by analyzing the number of Naturalizer stores affected by the purity requirement as a percentage of "retail store outlets," not including department and discount stores. (Brown's brief at 18; Corbet Aff. at ¶ ¶ 6,7). Plaintiffs define the relevant market, or submarket, as those stores which sell women's comfort casual shoes. Under Brown Show, the plaintiffs' definition of the relevant submarket as "women's comfort casual shoes" has some merit. Accordingly, the record before the Court presents a factual dispute over the proper definition of the relevant market. Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324, 1329 (7th Cir. 1981)(citations omitted)("The definition of relevant markets within which to measure the effects on competition... is a question of fact.)

In the case at bar, Brown identifies the market as retail shoe stores in Wisconsin. In light of Brown Shoe, the Court finds that Brown's proposed market is too broad in that it fails to take into account a distinct submarket - women's shoes. Because a "natural barrier" exists which insulates competition between men's, women's, and children's shoes, each represents a separate submarket. International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp., 518 F.2d 913, 933 (9th Cir. 1975) (interpreting Brown Shoe.) Accordingly, the Court cannot accept Brown's 1.8% and 1.4% market share calculations because they are based on the general market for retail shoes.

Plaintiffs' proposed market definition suffers its own weakness in that it identifies a classification of women's shoes. "comfort casual," which they have not supported by

argument, case law, or evidence. First, with resect to their submarket classification, plaintiffs fail to discuss or offer facts that might show that comfort casual shoes are not "reasonably interchangeable" with other types of women's shoes. See Sargent-Welch, supra at 710, citing United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)("If two products are 'reasonably interchangeable by consumers for the same purposes,' they are considered to be in the same market,") While plaintiffs have repeatedly referred to the targeted customers as "women, usually mature women for whom fit and comfort rather than high fashion or bargain prices were primarily important" (Schoenecker Aff. at 25), they have failed to make a showing (beyond Schoenecker's testimony) on the fundamental issue of whether these shoes are (or are not) "reasonably interchangeable" with other types of women's shoes. Plaintiffs' failure on this critical point leaves the relevant submarket indistinct and therefore unresolved.

While this dispute involves an issue of fact, it is not a material one. Even if the Court accepts plaintiffs' submarket definition of "women's comfort casual shoes," they have failed to identify the Wisconsin stores which compete in this submarket and, most importantly, what percentage thereof were effected by the Brown purity policy. Plaintiffs have alleged only that "SAS lost thirty percent of its national market share and that there was a restriction in overall supply to the market by virtue of Brown's purity program, because the SAS shoes were not supplanted by a comparable volume of the quickly doomed Brown 'knock-offs.'" (opposition at 62). Even accepting the evidence regarding SAS's decreases sales, summary judgment must be

entered in Brown's favor because plaintiffs have presented no "evidence that tends to exclude the possibility the defendant's conduct was as consistent with competition as with illegal conduct." Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1412-1413 (7th Cir. 1989); see also, Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986); Great Escape, Inc. v. Union city Body Co., 791 F.2d 532, 540 (7th Cir. 1986). In conclusion, plaintiffs have failed to "suppl[y] even the basic facts and figures necessary...,let alone a sophisticated econometric analysis normally necessary to show market power." Valley Liquors, ("Valley II" at 669). The failure to raise an inference that Brown enjoyed "significant market power," compels summary judgment on plaintiffs' claim that the purity requirement restrained trade in violation of § 133.03. Id.[14]

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[14] Even if the Court proceeded to analyze the purity policy, it is doubtful that plaintiffs would be able to show that "the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it." Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 394 (7th Cir. 1984). First, in light of the Court's previous discussion of the voluntary nature of the purity policy (Decision and Order at 4), it seems unlikely that plaintiffs were "restrained within the meaning of the antitrust laws. See Schachar v. American Academy of Ophthalmology, Inc., 870 F2d 397, 399 (7th Cir. 1989); Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d. 90, 97 (2d Cir. 1987)(The Second Circuit found no antitrust restrain where defendant did not prevent plaintiff from purchasing other products, but instead required "merely [that where defendant did not prevent plaintiff from purchasing other products, but instead required "merely [that plaintiff] sell other manufacturers' products from a separate salesroom facility.") Second, plaintiffs have offered no case law which holds that conditions placed on the use of a trademark, such as those involved in this case, implicate the antitrust laws. In this regard, almost the entirety of plaintiffs' antitrust analysis (pages 47-62) is directed to the "otherwise reasonable"

(continued...)

The Tying Claim.

The plaintiffs did not allege a "tying" claim in the complaint and therefore it could be dismissed for that reason. Thomason v Nachtrieb, 888 F.2d 1202, 1205 (7th Cir. 1989); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)(the complaint must be judged as framed without reference to un-pled assertions). Nevertheless, the Court will examine Brown's motion on the merits.

Plaintiffs' "re-characterization" of their "restraint of trade" claim as one of unlawful "tying" permits the application of a less onerous "per se" test. Tying arrangements are "per se" illegal. A tying claim requires: (1) two distinct products; (2) a sale or agreement to sell one product (the tying product) on the condition that a second product (the tied product) be purchased or excluded;[15] (3) the seller must have sufficient economic power in the tying product market to force the buyer to buy or refrain from buying the tied product; and (4) the arrangement affects a not insubstantial amount of commerce in the tied product market. (opposition at 54, citing Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 9-18 (1984)). Plaintiffs have identified the Naturalizer specialty store "franchise" as the tying product and all "non-Naturalizer shoes" as the tied product. (opposition at 56).

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[14](...continued)
and "per se" tests rejected by the Court.

[15] As discussed infra, plaintiffs' "or excluded" phrase is inaccurate.

Brown points out that plaintiffs' identification of the tying product as the Naturalizer "franchise" is incorrect as a matter of fact and law. The Court has already rejected plaintiffs' unsubstantiated allegation that they enjoyed a franchisor/franchisee relationship with Brown. (Decision and Order at 8-9). Moreover, the Seventh Circuit in Jack Walters & Sons, Corp. v. Morton Bldg., Inc., 737 F.2d 698, 704-705 (7th Cir.) cert. denied, 469 U.S. 1018 (1984), considered a similar claim and rejected it. In Jack Walters, the Seventh Circuit held that a kit of prefabricated building components and its tradename were "inseparable." Id. In doing so, the Seventh Circuit considered plaintiffs' "franchise" cases and distinguished them by considering whether the trademark identified a "product" or an "operation." Id. Judge Posner reasoned that the purpose of a franchise is "not to distribute the trade-marked goods of the franchisor, but... to conduct a certain business under a common trade-mark or trade name." Id. Just as the plaintiff in Jack Walters could not separate the trade-mark from the product, plaintiffs can not separate the Naturalizer trade-mark from the Naturalizer shoes. In accordance with Jack Walters, the Court concludes that the Naturalizer specialty stores, such as those owned by plaintiffs, serve merely to "distribute the trade-marked goods" of Brown. Therefore, even assuming that plaintiffs were Naturalizer franchisees, the Naturalizer trademark is not a distinct product for purposes of a tying claim.

Not only does the Naturalizer trademark not constitute a "tying" product because it is indistinct from the Naturalizer shoe itself, the allegedly "tied" product is not a product at all. Plaintiffs do not allege that the Naturalizer shoes

constitute the "tied" product, but rather "all non-Naturalizer shoes." In distinguishing the trademark (or franchise) from the product to which it refers, the typical plaintiff seeks to have the now separate product considered the "tied" product, i.e; the trademark (or franchise) becomes the "tying" product and the shoes become the "tied" product. In the case at bar, plaintiffs do not claim that the Naturalizer shoes are the tied product. Instead, they claim that the tied product is a promise to refrain form buying non-Naturalizer shoes. In support of this argument, plaintiffs cite Northern P.R. Co. v. United States, 356 U.S. 1, 5-6 (1958), in which the Supreme Court stated that an illegal tying occurs where a buyer must "purchase[] a different(or tied) product, or at least, agree[] *that he will not purchase that product from any other supplier.*" (emphasis added by plaintiffs). Because they have defined the tied product as "all non-Naturalizer shoes," plaintiffs seize upon the second portion of the above sentence. But standing alone, and on the facts of the cases cited by plaintiff, it makes no sense to promise to refrain from buying another supplier's product without the understanding (either explicit or implicit) that one will therefore purchase that product from the seller of the "tying" product.

In apparent recognition of this fact, plaintiffs argue that "[i]n none of these cases were the buyer/lessees required to purchase any minimum amount from the sellers/lessors. The 'tie' existed purely because of the agreement's requirement excluding other supplier's products." (opposition at 57-58). But the cases cited by plaintiffs involve more than a mere "promise to exclude." Each case involved a "tied" product. For example, in Northern Pacific, supra, the

United States challenged Northern Pacific's attempt to lease valuable property abutting the railroad on the condition that the lessees promise to use only Norther Pacific as their carrier. In United Shoe Machinery Corp v. United States, 258 U.S. 451 (1922), the patentee of certain shoe manufacturing machines made numerous conditions on the lease of their equipment, including among other things, that supplies (the "tied" product) must be purchased from the patent holder. In International Business machines Corp. v. United States, 298 U.S. 131 (1936), IBM "tied" the purchase of its own punch cards to the lease of its tabulating machines. In International Salt Co. v. United States, 332 U.S. 392 (1947), the petitioner was found to have "tied" the purchase of salt (from itself) to the lease of its salt machines. All of these cases involve a "tied" product, not simply a promise to exclude. Even in Northern Pacific, which contains the cited language, putative lessees were required to use Northern Pacific as their exclusive rail carrier.[16]

Plaintiffs have presented no authority for the proposition that a promise to exclude, absent a concomitant agreement, either express or implied, to purchase the "excluded" product from the sellers/lessors constitutes a

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[16] Further, in each of these cases, without purchasing the "tied" product, the "tying" product had no value. For example, if the lessee of a salt machine promised not to buy salt from any other supplier, the salt machine would have no value unless he purchased (to use plaintiffs' phrase) "some minimum amount" of salt from the lessor. By contrast, in the case at bar, assuming the trade-mark (or franchise) was the "tying" product and "the promise to exclude all non-Naturalizer shoes" was the "tied" product, plaintiffs' promise to exclude non-Naturalizer shoes does not render the trade-mark (or franchise) useless because the plaintiffs will continue to sell the Naturalizer shoes.

"tied" product. Accordingly, plaintiffs' allegation that "all non-Naturalizer shoes" constitute a "tied" product is rejected. Under the facts and allegations of this case, plaintiffs have failed to show the existence of two distinct products and their tying claim must be dismissed.

7. Statutory Unfair Trade Practices. ¶ ¶ 39-42.

Plaintiffs' final claim, under Wis. Stats. § 133.05, alleges that Brown extended to its various subdivisions and entities "special services or privileges not extended to the plaintiffs purchasing under like terms and conditions." (Complaint at ¶ 40).[17] Section 133.05 represents Wisconsin's version of the Robinson-Patman Anti-discrimination Act, 15 U.S.C. § 13, et. seq. Obstetrical & Gynecological Assocs. v. Landig, 129 Wis.2d 362, 384 N.W.2d 719 (Ct.App. 1986); Carlson & Erickson v. Builders v. Lampert Yards, Inc., 183 Wis. 2d. 220, 515 N.W.2d 305, 307 (Ct.App.1994)("[C]h. 133, STATS., is drawn largely from federal antitrust law...") Brown argues that a § 133.05 claim does not lie where the beneficiary of the alleged preferential treatment is a subdivision or subsidiary of the alleged wrongdoer. (brief at 30 citing Landig supra; Security Tire & Rubber Co. v. Gates Rubber

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[17] § 133.05 provides in pertinent part: Secret rebates; unfair trade practices. (1) The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and conditions, such payment, allowance or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited.

Co., 598 F.2d 962, 965 (5th Cir.) cert. denied, 444 U.S. 942 (1979)); see also, Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214 (6th Cir. 1985)(per curiam); Mt. Pleasant v. Associated Electric Cooperative, Inc., 838 F.2d 268, 278-279 (8th Cir. 1988); Emil J. Lauter Co. v. Brunswick Corporation, 532 F.Supp. 983, 985 (N.D.III. 1982) (following Gates Rubber); Stamp v. Inamed Corporation, 777 F.Supp. 623, (N.D.III. 1991) (declining to apply Gates Rubber and Copperweld Corp. v. Independent Tube Corp, 467 U.S. 752 (1984) in a breach of contract action, but acknowledging their applicability in antitrust cases). While no cited Wisconsin case specifically applies Gates Rubber, Wisconsin's adoption of federal antitrust principles in general, and Copperweld in particular, suggest that Wisconsin courts would follow Gates Rubber.

Plaintiffs appear to have conceded this point by arguing that the cited authority is "academic" because they have now discovered that non-Brown entities (Dayton/Hudson/Marshall Fields) were given "secret allowances, rebates, refunds, unearned discounts and other secret extension of special services and privileges, including return of goods..." (opposition at 76). Plaintiffs further argue that Brown is not prejudiced by this newly asserted claim because "the complaint did put defendants on notice (sic) they were being charged with price discrimination[18] and unfair trade practices in Brown's relationship with

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[18] Price discrimination in Wisconsin is governed by Wis. Stats. §133.04. Plaintiffs' complaint at ¶ ¶ 39-42 does not allege price discrimination or invoke § 133.04. Whether plaintiffs allege violations of § 133.04 (price discrimination) or § 133.05 (secret preferences), Gates Rubber, infra, is equally applicable.

department stores." (opposition at 77). But a § 133.05 claim involving a non-Brown affiliated shoe department clearly is significantly different from a claim involving a shoe department run by a subsidiary or subdivision of Brown. Plaintiffs have not sought leave to amend their complaint and legal memoranda are not the proper method for doing so. (Decision and Order at 30). Accordingly, Brown's motion for summary judgment on plaintiff's § 133.05 claim, as set forth in the complaint must be granted.[19]

In conclusion, the evidence of record supports only one finding - the plaintiffs made a business decision that the value of using the Naturalizer in the trade dress of their stores outweighed the risk that the "knock-offs" would fail to replace the SAS models removed from the stores. That decision provides no basis for the success of any of the causes of action advanced in the complaint. Accordingly, the Brown Group's motion for summary judgment dismissing the complaint in its entirety is granted.

C. THE COUNTERCLAIM.

Brown has also moved the Court for summary judgment on its counterclaim alleging that the plaintiffs have

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[19] If the Court were to consider plaintiffs' newly crafted claim, summary judgment would still be appropriate. Plaintiffs cite the Court to Schoenecker's affidavit at ¶ 51 and Exhibits 44 and 101. Even if this evidence were sufficient to show that Dayton/Hudson/Marshall Field's receive "secret rebates, unearned discounts, return privileges, and massive advertising allowances...," plaintiffs have offered no evidence or argument that theses entities are "purchasers purchasing upon like terms and conditions..." as required by § 133.05 (1).

failed to abide by the terms of a promissory note (the "Note") and that the Schoeneckers have personally guaranteed payment thereunder. As stated above, by early 1993, plaintiffs were indebted to Brown in the amount of $367,900.00 and Westowne, in an effort to resolve this outstanding debt and maintain business dealings, pledged a Note to Brown. Brown alleges that the Schoeneckers have personally guaranteed the indebtedness evidenced by the Note. The first guarantee, signed by the Schoeneckers on August 24, 1980, guarantees the indebtedness of "C.A. Biwer Inc., of La Crosse Wisconsin" in the amount of $50,000. (Wright Aff., Exhibit C). The second, executed on August 16, 1991, guarantees the indebtedness of "Westowne Shoes, Inc. of Waukesha, WI (all locations)"in the amount of $250,000. (Wright Aff., Exhibit B). While both guarantee indebtedness to Brown Shoe on "heretofore or hereafter contracted on any open or stated account, promissory note or acceptance, or for any unpaid balance on any account, promissory note or acceptance", both are triggered by the debtor's default. (opposition at 5; reply at 5-6; Wright Aff., Exhibits B & C).

As required by the summary judgment methodology set forth on pages 5-6 of this opinion, for the Brown Group to succeed on the motion, there must be no genuine issue of material fact as to Westowne's default on the Note and non as to the scope of the personal guarantees.

THE NOTE

The terms of the Note are relatively simple and straightforward. (Wright Aff., Exhibit A). The Note

provides that "for value received," the sum of $367,900.00 will be paid on or before April 1, 1998. Further, "payments are to be 20% of purchases for a period of five (5) years with no interest charged." In short, the parties contemplated that Westowne would pay down the Note by paying 20% more than its actual purchases, with the difference being applied to the Note. According to Reginald Wright, Director of Credit for Brown Shoe Company, "the fundamental basis of the note was that Westowne Shoes would do substantial future business with Brown Shoe at the dollar volume level that it had in the past." Wright Aff. at ¶ 10). The Brown Group alleges that Westowne is in default because "it failed to do business at the dollar level contemplated by the Note (with its total purchases down approximately 40 percent for the level for the prior year) and as a result, has failed to make payments at the level *contemplated* under the Note. (emphasis supplied)(brief at 4; Wright Aff. at ¶ 18). In this regard, the Brown Group alleges that Westowne and the Schoeneckers failed to disclose that they were "ending or substantially limiting [Westowne's] future business relationship with Brown Shoe..." (brief at 4, n. 6; Wright Aff. ¶ 14). In addition, the brown Group alleges that Westowne "has also failed on certain transactions." (brief at 4). Finally, the Brown Group argues that the Note is tainted with "misrepresentation" because Westowne and the Schoeneckers failed to disclose that they intended to commerce a lawsuit in Waukesha County, and in fact, had already done so. (brief at 4, n. 6).

With respect to the "level of business that Westowne was intended to maintain, the Note is silent. In addition, Schoenecker avers that he requested that paragraph six (6) of

the Note be stricken because it appeared to give Brown Shoe the option of collecting the balance of the Note if, in its opinion, there was a substantial change in Westowne's business. (opposition at 7; Schoenecker Aff. at ¶ 7). Schoenecker avers that he specifically told Wright that he was concerned about this provision because it seemed probable that he would be closing the East Towne store. The provision was stricken. Despite the Brown Group's argument, the "level" of business that Westowne needs to maintain under the Note is not readily ascertainable on the record before the Court. Accordingly, a genuine issue of material fact exists as to whether the decline in Westowne's purchases represents a default on the Note.

With respect to the allegation that Westowne "has also failed on certain transactions to pay the additional 20 percent of purchases which was to be applied to the Note on all transactions," plaintiffs point out that the "sole" transaction referred to was a $25,000 "transcan" automated purchase posted in October of 1993. Schoenecker avers that he and Wright reached a separate agreement that Westowne would discontinue its participation in transcan system because the automated system could not accommodate the required payment in advance and surcharge arrangements of the Note. (opposition at 6; Schoenecker Aff. at ¶ ¶ 21, 22). Further, Schoenecker avers that this debt has been paid down pursuant to this separate agreement. (Id.) Accordingly, a genuine issue of material fact exists regarding Westowne's compliance with the "20% of purchases" payment required under the Note. Because the Brown Group has not presented sufficient evidence for the Court to conclude that Westowne is in default on the Note, an examination of the

Schoeneckers' obligations under the personal guarantees is necessary.

In conclusion, because genuine issues of material fact concerning the issue of Westowne's default on the Note remain, the Brown Group's motion for summary judgment must be denied.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The Brown Group's motion for summary judgment dismissing plaintiffs' complaint in its entirety is **GRANTED**;

2. The Brown Group's motion for summary judgment on its counterclaim is **DENIED**; and

3. City Insurance's motion for a stay of the trial pending the Court's ruling on the Brown Group's motion to reconsider its declaratory judgment of non-coverage is **DENIED AS MOOT.**

Dated at Milwaukee, Wisconsin, this 13th day of December, 1994.

SO ORDERED.

HON. RUDOLPH T. RANDA
U.S. District Judge

APPENDIX D

United States District Court
Eastern District of Wisconsin

WESTOWNE SHOES, INC., and CARL A. BIWER COMPANY,

Plaintiffs,

v. **Case Number: 93-C-720**

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.,

Defendants and Counterclaim Plaintiffs,

v.

BARBARA B. SCHOENECKER and RUDOLPH V. SCHOENECKER,

Counterclaim Defendants.

DECISION AND ORDER

This matter comes before the Court on plaintiffs', Westowne Shoes, Inc. and the Carl A. Biwer Company ("plaintiffs"), motion for reconsideration of the Court's

December 13, 1994 Decision and Order wherein the Court granted the defendants' ("Brown Group") motion for summary judgment dismissing the complaint in its entirety. For the reasons set forth below, the motion is denied.

ANALYSIS

A motion to reconsider is appropriate where the Court has "patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court... or has made an error not of reasoning but of apprehension." Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1991). Much of plaintiffs' sixty-six (66) page motion for reconsideration is a re-examination of the evidence and arguments that the Court has already considered and rejected. Nevertheless, there are some issues which require discussion.

First, the Court must consider plaintiffs' argument regarding the business relationship between the plaintiffs and the Brown Group. The plaintiffs argue that the Court was incorrect in its characterization of that relationship as one of vendor/vendee. (Decision and Order at 9). In commenting on the plaintiffs' repeated reference to their "dealership" or franchise, the Court noted that the plaintiffs, "nowhere undertake a legal analysis of these respective business forms or demonstrate how the evidence supports a finding that either existed." (Id.) Plaintiffs argue that neither party discussed this matter "because the existence of a dealership was not challenged in Brown's brief, [and therefore] the plaintiffs' legal argument did not focus on that issue, but

rather simply on the existence of a contract." (plaintiffs' motion for reconsideration at 19.)

The extensive analysis of the Wisconsin Fair Dealership Law ("WFDL") in plaintiffs' motion does not undercut the Court's reasoning or its conclusion. This is not a "dealership" case and therefore the extensive protections available thereunder are not available to the plaintiffs. The Court examined plaintiffs' breach of contract claims in light of their business relationship with the Brown Group prior to and after the 1987 "purity" letter. With respect to the prior agreements, the plaintiffs do not quarrel with the Court's examination of the various letters which supported the existence of a "contractual relationship" including a 1978 letter which provides that, "use of the trademarks does not affect the right of Brown... or yourself to terminate the sale of NATURALIZER and FOOTWORKS shoes to you at any time either party desires." (Decision and Order at 2, citing Exhibit A). Despite the plaintiffs' extensive discussion of a "community of interest" which may be (or may have been) protectable under the WFDL, this is not, as stated above, a dealership case.

The Court's review of the factual and legal relationship of the parties based on the letters prior to and including the 1987 purity letter compelled a conclusion that the conditions placed on the use of the trademarks subsequent to the 1987 letter did not give rise to contractual rights that the plaintiffs may now sue upon. Indeed, if the 1978 letter gave either party the right to "terminate" the relationship at "any time," it seems clear that the 1987 letter which modified the conditions under which the trademarks could be

used was equally permissible. In conclusion, the characterization of the contractual relationship as that of a "dealership" under the WFDL does not change the Court's breach of contract analysis as the extensive protections of the WFDL are not before this Court.[20]

Plaintiffs also argue that the Court improperly characterized as an "option," the choice to go pure and keep the NATURALIZER sign, or remove the sign and convert to a "multi-line" store. (plaintiffs' motion at 46-49). Extensive reargument is made of the fact that going to a multi-line store would result in a loss of the "franchise" because other specialty stores would move into the same malls and take the Naturalizer business. Removing the Naturalizer sign "would be like closing our doors." (plaintiffs' brief at 47) (citation omitted). Plaintiffs argue that the "cruciality of being able to continue operations under the Naturalizer sign and as a Naturalizer Specialty Store is confirmed by defendants' own documents." (Id. at 48) One reason is that the sign is "so important to bringing customers into the store." (Id.) By way of analogy, plaintiffs argue:

> If the operator of a McDonald's hamburger store contended it would be a serious economic detriment to him to change the name of his operation to Joe's Hamburger

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[20] Neither does it change the Court's analysis on the remaining causes of action because, where relevant, the Court weighed plaintiffs' arguments as if a franchise or (dealership) did exist. See Decision and Order at 20; 21-22, n.10; 30-31.

> store and lose the benefit of both local and national McDonald advertising and its established reputation, no reasonable person would argue with him.

(Id.) The weakness in plaintiffs' analogy is that it works both ways. No "reasonable person" would argue with McDonald's if it required, as it plainly does, that in exchange for using the Golden Arches trademark, a franchisee may not sell food items from Wendy's. McDonald's can impose such a condition even if Wendy's makes better hamburgers; meaning that Joe must chose between using the trademark and selling McDonald's food and not using the trademark and selling whatever food he desires. The same is true of the case at bar. Even if the Naturalizer "knock-offs" were not as good as the other lines of shoes that were dropped, the Brown Group certainly can put conditions on the use of its trademark including, "you can only sell Naturalizers." Consistent with the Court's earlier determination, and despite plaintiffs' "reargument," an option did exist, no matter how unattractive.

Of the remaining challenges, the only one which is proper on reconsideration is the plaintiffs' argument that the court impermissibly rejected Schoenecker's affidavit as "not persuasive." (plaintiffs' brief at 60). As pointed out in the Brown Group's opposition, the Court was within prevailing summary judgment standards in rejecting the affidavit which contradicted his earlier deposition. Diliberti v. United States, 817 F.2d 1259, 1263 (7th Cir. 1987) ("It is well-established that a party cannot create a genuine issue of fact by submitting an affidavit containing conclusory allegations

which contradict plain admissions in prior depositions or otherwise sworn testimony.")

Finally, the plaintiffs' have requested oral argument on this motion and certification to take an interlocutory appeal pursuant to 28 U.S.C. 1292 (b). With respect to oral argument, the Court is satisfied that the record in this case has been fully developed both factually and legally. Accordingly, the request for oral argument will be denied. The Brown Group opposes plaintiffs' motion for certification citing the "strong policy against piecemeal appeals." Freeman v. Kohl & Vick Machine Works, Inc., 673 F.2d 196, 201 (7th Cir. 1982) (citation omitted). The Court agrees. The plaintiffs have not made the required showing that there is a "substantial ground for difference of opinion" on a "controlling question of law." See 28 U.S.C. 1292 (b). Moreover, the Brown Group has represented that it can present its case-in-chief on the counterclaims in a single day. (The Brown Group's opposition at 9, n.3). The Court will initiate a telephonic conference call on Friday, June 23, 1995 at 2:00 p.m. to set final pretrial and trial dates in this matter.[21]

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motions to file an amended and oversized brief is **GRANTED;**

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[21] The Court declines to discuss the plaintiffs' "re-crafted" tying claim because it remains subject to dismissal under Jack Walters & Sons v. Morton Building, Inc., 737 F. 2d 698 (7th Cir.) cert. denied, 469 U.S. 1018 (1984).

2. Plaintiffs' motion for reconsideration is **DENIED**;

3. Plaintiffs' motion for oral argument is **DENIED**;

4. Plaintiffs' motion for certification to take an interlocutory appeal is **DENIED**; and

5. The Court will initiate a scheduling conference call on Friday, June 23, 1995 at 2:00 p.m.

Dated at Milwaukee, Wisconsin, this 16th day of May, 1995.

SO ORDERED,

HON. RUDOLPH T. RANDA
U.S. District Judge

APPENDIX E

United States District Court
Eastern District of Wisconsin

JUDGMENT IN A CIVIL CASE

WESTOWNE SHOES, INC., and CARL A. BIWER COMPANY,

Plaintiffs,

v. **Case Number: 93-C-720**

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.,

Defendants and Counterclaim Plaintiffs,

v.

BARBARA B. SCHOENECKER and RUDOLPH V. SCHOENECKER,

Counterclaim Defendants.

Decision by Court. This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED **that the motion for summary judgment of defendants Brown Group, Inc.,**

Brown Shoe Company, Famous Footwear Company, Brown Group Retail, Inc., Wohl Shoe Company, and Brown Group International Inc., (Brown Defendants) against plaintiffs Westowne Shoes, Inc. and Carl A. Biwer Company is GRANTED.

Pursuant to stipulation of the parties filed March 19, 1996, JUDGMENT is entered in favor of the Brown Defendants on their amended counterclaim against Westowne Shoes, Inc., in the amount of $333,138.81 without further costs. JUDGMENT is also entered in favor of the Brown Defendants on their amended counterclaim against Carl A. Biwer Company in the amount of $5,821.64 without further costs. The Brown Defendants amended counterclaim against Barbara B. Schoenecker and Rudolph V. Schoenecker is DISMISSED WITHOUT PREJUDICE.

This action is hereby DISMISSED.

March 19, 1996

SOFRON B. NEDILSKY
Clerk

APPENDIX F

In the

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 14, 1997

Before

Hon. RICHARD A. POSNER, Chief Judge

No. 96-1955

WESTOWNE SHOES, INC.
and CARL A. BIWER CO.,

Plaintiffs-Appellants,

v.

BROWN GROUP, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93 C 720 -- **Rudolph T. Randa**, *Judge*

Upon consideration of the **"MOTION OF PETITIONERS-PLAINTIFFS-APPELLANTS TO PERMIT FILING OF THEIR PETITION FOR REHEARING INSTANTER"** filed on February 4, 1997, by counsel for the plaintiffs,

IT IS ORDERED that the clerk file instanter the tendered copies of the Petition for Rehearing of the appellants.

APPENDIX G

In the

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois

April 7, 1997

Before
Hon. Richard A. Posner, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

No. 96-1955

WESTOWNE SHOES, INC.
and CARL A. BIWER CO.,

Plaintiffs-Appellants,

v.

BROWN GROUP, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 93 C 720 – **Rudolph T. Randa**, *Judge*

ORDER

On March 14, 1997, plaintiffs-appellants filed a petition for rehearing. All the judges on the original panel

have voted to deny the petition. The petition is therefore DENIED.

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE VII

"In Suits common at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 56(b), (c) and (e), Federal Rules of Civil Procedure:

> "**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> "**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

"**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 3(a), Federal Rules of Appellate Procedure:

> **Rule 3. Appeal as of Right -- How Taken**
>
> **(a) Filing the Notice of Appeal.** An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Rule 28(a)(3), (4), (5) and (6), Federal Rules of Appellate Procedure:

> **(a) Appellant's Brief.** The brief of the appellant must contain, under appropriate headings and in the order here indicated:
>
> * * * * *
>
> **(3)** A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(5) A summary of argument. The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

(6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

Rule 40(a), Federal Rules of Appellate Procedure:

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the

time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

APPENDIX I

STATE OF WISCONSIN
CIRCUIT COURT
WAUKESHA COUNTY

WESTOWNE SHOES, INC.,
a Wisconsin corporation,
and CARL A. BIWER COMPANY
a Wisconsin corporation,
244 West Main Street
Waukesha, Wisconsin 53186

Plaintiffs,

vs.

Case Classifications:
Breach of Contract,
Case Code: 30303
Intentional Tort,
Case Code: 30106
Unclassified,
Case Code: 30703

BROWN GROUP, INC., a Missouri corporation, 8400 Maryland Avenue, St. Louis, Missouri, 63166;
BROWN SHOE COMPANY, a Missouri corporation, 8400 Maryland Avenue, St. Louis, Missouri, 63166;
FAMOUS FOOTWEAR COMPANY, a Wisconsin association, 208 East Olin Avenue, Madison, Wisconsin 53713;
BROWN GROUP RETAIL, INC., a Pennsylvania corporation; 8400 Maryland Avenue, St. Louis, Missouri, 63166;
WOHL SHOE COMPANY, a Missouri

Case No. 93-CV-1291

association, 8400 Maryland Avenue,
St. Louis, Missouri 63166; BROWN GROUP
INTERNATIONAL, INC., a Delaware
corporation, 8400 Maryland Avenue,
St. Louis, Missouri 63133;
ABC, XYZ, and INSCO,

Defendants.

COMPLAINT

The plaintiffs complain against the defendants as follows:

INTRODUCTION AND DESCRIPTION OF PARTIES

1. This is an action by two retail shoe companies to recover damages from the Brown Shoe Company, its corporate parent Brown Group, Inc. ("Brown Group") and other Brown Group subsidiaries, divisions and related entities, which engage in the manufacture, wholesaling and retailing of shoes, including Naturalizer and other lines of women's shoes. The plaintiffs allege causes of action for breach of contract, promissory estoppel, negligent misrepresentation, misrepresentation/strict liability, unfair competition, violation of Wisconsin's antitrust laws and unfair trade practices, all arising out of conduct engaged in by the defendants on and after June 11, 1987.

2. The plaintiff Westowne Shoes, Inc. ("Westowne") and the plaintiff Carl A. Biwer Company ("Biwer") are Wisconsin corporations, whose principal offices are located at 244 West Main Street, Waukesha, Wisconsin 53186. At all relevant times: the owners of Westowne have owned a substantial interest in Biwer; Westowne has operated Naturalizer Specialty Stores in the Bayshore Mall, Glendale, Wisconsin, in the Fox River mall in Appleton, Wisconsin, and in the East Town Mall and West Town Mall in Madison, Wisconsin; and Biwer has (until January 1991) operated a Naturalizer Specialty Store in La Crosse, Wisconsin, plus a multi-line family shoe store in Waukesha, Wisconsin and a multi-line women's shoe department in a women's ready to wear store in Madison, Wisconsin.

3. The defendant Brown Group, Inc. ("Brown Group") is a $1.8 billion corporation with world-wide operations in footwear and specialty retailing. Its principal offices are located at 8400 Maryland Avenue, St. Louis, Missouri, 63166, and its agent for service in Wisconsin is C.T. Corp. System, 44 East Mifflin Street, Suite 1000, Madison, WI 53703. The other defendants are its subsidiaries or divisions. The defendant Brown Shoe Company is either a corporation or an association. Its principal offices are also located at 8400 Maryland Avenue, St. Louis, Missouri, 63166. It operates as a division of Brown Group and is engaged principally in the manufacture and wholesale of shoes, including the line of women's shoes known as Naturalizer shoes, and it (or its parent, Brown Group) owns and exploits the Naturalizer tradename and trademark. The defendant Famous Footwear Company

("Famous Footwear") is either a corporation or an association; its so-called "corporate offices" and principal place of business are located at 208 East Olin Avenue, Madison, Wisconsin 53713. The defendant Brown Group Retail, Inc. ("Brown Retail") is a Pennsylvania corporation. Its principal offices are located at 8400 Maryland Avenue, St. Louis, Missouri, 63166. Wohl Shoe Company ("Wohl") is either a corporation or an association. Its principal offices and place of business are located at 8400 Maryland Avenue, St. Louis, Missouri 63166. The defendant Brown Group International, Inc. is a Delaware corporation. Its principal offices and place of business are located at 8400 Maryland Avenue, St. Louis, Missouri 63166. Its agent for service in Wisconsin is C.T. Corp. System, 44 East Mifflin Street, Suite 1000, Madison, Wisconsin 53703. The defendants ABC, XYZ and INSCO are named pursuant to the Wisconsin fictitious name statute, § 807.12 Stats. ABC and XYZ are named as parties herein because they are divisions or affiliates of Brown Group, Inc. which participated in the misconduct complained of below. They are either corporations or associations. INSCO is named as a party herein because it is the insurance company which provided public liability insurance to one or more of the defendants covering conduct complained of herein. All of the defendants at all relevant times have done and do business in Wisconsin and are found in Wisconsin, and the events complained of herein occured principally in Wisconsin. The agreements establishing the plaintiffs' Naturalizer Specialty Stores were made in Wisconsin, their underlying purpose was to provide for retail shoe sales in Wisconsin and the trade and competition referred to herein, and restraints thereon alleged below, took place in Wisconsin.

ALLEGATIONS APPLICABLE TO ALL CLAIMS

4. Prior to June 11, 1987, the defendant Brown Group through its division known as Brown Shoe Company, entered into a series of agreements with the plaintiffs, under which the plaintiffs became Naturalizer dealers and operated Naturalizer Specialty Stores. The dealership agreements between the plaintiffs and Brown Group/Brown Shoe Company were contained in letters, bills of sale and other documents, samples of which are attached hereto as Exhibit A. These authorized the plaintiffs to use the Naturalizer tradename and trademark and display a Naturalizer sign, and to sell women's shoes manufactured by the Brown Shoe Company under the Naturalizer tradename and with the Naturalizer trademark. Pursuant to these agreements, the plaintiffs established Naturalizer Specialty Stores during the 1970's and early 1980's.

5. As of June 1987, all of the stores operated by Westowne pursuant to these agreements and the La Crosse store operated by Biwer pursuant to these agreements were so-called "Naturalizer Specialty Stores." This meant that, pursuant to the plaintiffs' agreements with Brown Group/Brown Shoe Company referred to above, the stores featured a Naturalizer sign and identified themselves as Naturalizer shoe stores, and Naturalizer was the principal line of shoes sold in the stores. Naturalizer was a high-quality line of women's shoes, but the defendants did not produce Naturalizer shoes in certain important classifications of women's casual shoes, especially the so-called "comfort casual" classification and moccasins. In order to have quality shoes in those classifications available for sale,

Naturalizer Specialty Stores, including those owned and operated by the plaintiffs, obtained and sold casual shoes manufactured by others, including such lines known as "SAS" and "Sebago." The profitability of the specialty stores depended heavily upon having casual shoes of such quality and acceptance available for sale to retail customers. A total of 621 Naturalizer Specialty Stores were established in various states throughout the United States as of June 1987. About half of these were owned by the defendant Wohl and the remaining half by independent dealers such as the plaintiffs.

6. Operating under this arrangement with the Brown Shoe Company/Brown Group in the years prior to June 1987, the plaintiffs invested hundreds of thousands of dollars in advertising and marketing efforts to promote the Naturalizer trademark and tradename as referring to high-quality shoes, all as contemplated by their contractual arrangements with Brown Shoe Company/Brown Group. In accordance with these contractual arrangements, the plaintiffs during that period also relied on their right to stock and sell casual shoes made by manufacturers other than Brown Group or its affiliates, and the plaintiffs planned their marketing and merchandizing accordingly.

7. Sometime shortly after June 11, 1987, the plaintiffs received from the defendant Brown Group and its Brown Shoe Company division a letter purporting to amend the terms of their agreements with Naturalizer Specialty Store owners. That letter, attached hereto as Exhibit B, required that specialty stores must thereafter fulfill what these defendants characterized as a "standard of purity," by

which they meant that Naturalizer Specialty Stores were forbidden to sell any line of shoes other than Naturalizer. The same letter represented that Brown Group and Brown Shoe Company had developed their product line in a way that insured a complete and balanced selection of Naturalizer shoes across all the major classifications of women's footwear, in recognition of the need in the marketplace for a single line specialty store serving the consumer with a broad selection of well styled footwear in sizes and widths manufactured to a high standard of quality and fit. Moreover, by this letter, together with the earlier agreements referred to above and the related communications between the plaintiffs and the defendants, these defendants promised that they would supply to the plaintiffs casual Naturalizer shoes comparable to the other Naturalizer classifications in fit, size, service and fashion, constituting an adequate replacement for the casual lines of other manufacturers being carried up to that point by the Naturalizer Specialty Stores.

8. In reliance upon the defendants' said representations and promises and as shown in Exhibit C hereto, the plaintiffs agreed to comply with the "standard of purity," proceeded to eliminate the non-Naturalizer casual lines from their Naturalizer Specialty Stores, ordered the Naturalizer casual shoes, continued to operate as Naturalizer Specialty Stores and spent additional large sums of money advertising and otherwise promoting the Naturalizer tradename and trademark.

9. The defendants failed to supply to the plaintiffs the casual Naturalizer shoes of the quality and types the defendants had represented were available and could be

provided. The defendants in fact had not developed an adequate, complete and balanced selection of Naturalizer shoes across all the major classifications of women's footwear, particularly in that they had not developed casual shoes (especially in the so-called "comfort casual" classification and moccasins) reasonably comparable in quality to the rest of the Naturalizer line. The casual shoes defendants did produce were of poor quality and shipped sporadically, disrupting the plaintiffs' business operations, antagonizing and disappointing retail customers, and effectively depriving the plaintiffs of the benefits of having a complete and balanced selection across all the major classifications of women's footwear. The defendants thus failed to comply with their promise to market and provide Naturalizer shoes in the complete and balanced selection of styles and of the standard of quality and fit they had represented were available and had promised they would provide. The defendants further injured the plaintiffs' business by repeatedly misleading them as to the quality and availability of shoes the defendants had available for sale.

10. Further, at all relevant times the defendants Brown Retail and Wohl operated retail shoe departments (under lease with department stores) in most of the same shopping malls where the plaintiffs' stores were located, selling Naturalizer shoes in direct competition with the Naturalizer Specialty Stores operated by the plaintiffs. These shoe departments operated by those defendants sold casual shoes made by manufacturers unaffiliated with Brown Group, notwithstanding that after June 11, 1987 Brown Group and Brown Shoe Company were prohibiting the plaintiffs from selling such shoes.

11. Also, Naturalizer Specialty Stores owned and operated by Wohl and Brown Retail in direct competition with the plaintiffs' stores were permitted by Brown Group/Brown Shoe Company to sell non-Naturalizer shoes with the Naturalizer label inserted, though the plaintiffs were not permitted by Brown Group/Brown Shoe Company to market these. Further, the defendants Brown Shoe Company and ABC were selling Naturalizer shoes to the shoe departments being operated by Brown Retail and Wohl, and to discount shoe stores being operated by Famous Footwear, at wholesale prices less than the prices being charged to the plaintiffs' Naturalizer specialty stores and on more favorable terms, so that the retail shoe departments and stores obtaining the shoes at lower wholesale prices and on better terms were able to and did charge retail prices less than the plaintiffs' stores had to charge. This price discrimination materially injured competition and injured the plaintiffs' ability to compete in the retail sale of women's shoes.

12. In addition, Brown Shoe Company and other divisions of Brown Group provided and sold to Naturalizer Specialty Stores owned and operated by Wohl and Brown Retail, and shoe departments leased and operated by them, Naturalizer patterns and classifications not available to the plaintiffs.

13. The defendants since June 11, 1987 have also engaged in false and deceptive labelling. This includes such activities, among others, as pasting Naturalizer labels into cheap shoes made in China and marketing those as supposed "Naturalizer" shoes being offered at substantial discounts. These and similar activities have not only resulted in the

plaintiffs' shoes being undersold, (or being undersold by an ostensibly equivalent shoe), but have also materially injured the quality image of the Naturalizer trademark promoted and established over many years by the plaintiffs, at great expense to them, and relied upon by them.

14. As a proximate result of the defendants' conduct alleged above and as further alleged below, the plaintiffs were and are being injured and damaged in their business and property, including the loss of ability to compete, past and future loss of profits, incurring debt, loss in the capital value of their stores and business operation, and other damages. These damages are ongoing and are in such amount as will be determined at trial herein.

BREACH OF CONTRACT

15. The allegations in paragraphs 1 through 14 above are incorporated by reference here as though pleaded verbatim.

16. From and after the June 11, 1987 modification of the agreements under which the plaintiffs operated their Naturalizer Specialty Stores, and the plaintiffs' consent to and compliance with that modification, the defendants were under contractual obligations: (a) to supply to the plaintiffs' specialty stores casual classifications of Naturalizer shoes comparable in quality to the other Naturalizer shoes and to the non-Naturalizer casual shoes (such as the SAS and Sebago lines) which the plaintiffs had theretofore sold in their Naturalizer Specialty Stores, (b) to maintain Naturalizer as a high-quality line, (c) to sell shoes to the plaintiffs at a

fair and true wholesale price, and (d) to otherwise act in accordance with their promises alleged above. At the time the parties entered into those agreements and particularly when the defendants Brown Group and Brown Shoe Company initiated the "purity standard" modification on and after June 11, 1987, it was understood, foreseeable and foreseen by all parties that the profitability of the plaintiffs' specialty stores was dependent upon their having an adequate, consistent and predictable supply of such quality women's shoes in all classifications, as alleged above, and that a breach by the defendants of their contractual obligations would materially injure and damage the plaintiffs' entire business and would probably destroy their profitability.

17. The defendants breached their contractual obligations in each of the following respects, among others:

a. The defendants failed to supply casual Naturalizer shoes of the kind and quality promised.

b. The defendants made deliveries of shoes in an unpredictable, tardy and erratic manner, so that the plaintiffs could not engage in reasonable business planning.

c. The defendants supplied Naturalizer shoes in supposed fulfillment of their contractual obligations that were illfitting, poorly made and in other respects of poor quality.

d. The defendants failed to sell shoes to plaintiffs at a true wholesale price, and in fact

charged plaintiffs a higher price than it did to Wohl, Brown Retail and Famous Footwear Company.

e. The defendants failed to make available to plaintiffs the entire Naturalizer line.

f. The defendants cheapened the meaning of the Naturalizer tradename, label and trademark by attaching them to poor quality, cheap shoes.

g. The defendants breached their contractual obligations by their other misconduct alleged in this Complaint.

18. The defendants' breach of contract caused the damages to the plaintiffs alleged above and in an amount exceeding Two Million Dollars ($2,000,000).

PROMISSORY ESTOPPEL

19. The allegations in paragraphs 1 through 18 above are incorporated by reference here as though pleaded verbatim.

20. The defendants should reasonably have expected that their promise to supply the quality, casual classifications of Naturalizer Shoes to the plaintiffs for sale in the plaintiffs' specialty stores would induce both action and forbearance of a definite and substantial character by the plaintiffs in the following respects, among others: dropping SAS, Sebago and other non-Naturalizer lines; continuing to

operate as a Naturalizer Specialty Store; advertising and other promotion of the Naturalizer trademark, and forbearance from seeking legal relief.

21. The defendants' promises did in fact induce such action and forbearance, in that, among other things, the plaintiffs dropped the SAS and Sebago lines from their Naturalizer Specialty Stores, they complied with the "purity standards" imposed by the defendants, they spent substantial sums of money promoting the Naturalizer name and trademark; they forbore seeking legal relief, and in other respects.

22. Injustice can be avoided only by enforcement of the defendants' promise, through this damage action. Accordingly, under the doctrine of promissory estoppel, the plaintiffs are entitled to the damages complained of above.

NEGLIGENT MISREPRESENTATION

23. The allegations in paragraphs 1 through 22 above are incorporated by reference here as though pleaded verbatim.

24. The representations of fact made by Brown Group/Brown Shoe Company in their June 11, 1987 letter to the plaintiffs that these defendants had achieved product development to insure that the Naturalizer line then offered a complete and balanced selection across all the major classifications of women's footwear in a broad selection of well-styled footwear in sizes and widths, manufactured to

high standards of quality and fit that would meet the expectations of plaintiff's customers, were untrue.

25. These defendants were negligent in making these representations in that they should have reasonably foreseen that such misrepresentations would subject the interests of the plaintiffs to an unreasonable risk of damage.

26. The plaintiffs believed, were materially induced by and relied on these misrepresentations to their damage.

MISREPRESENTATION: STRICT RESPONSIBILITY

27. The allegations in paragraphs 1 through 26 above are incorporated by reference here as though pleaded verbatim.

28. The representations of fact made by Brown Group/Brown Shoe Company in their June 11, 1987 letter to the plaintiffs that these defendants had achieved product development to insure that the Naturalizer line then offered a complete and balanced selection across all the major classifications of women's footwear in a broad selection of well-styled footwear in sizes and widths, manufactured to high standards of quality and fit that would meet the expectations of plaintiff's customers, were untrue.

29. These defendants made these misrepresentations as facts based on their own personal knowledge or in circumstances in which they ought to have known the truth or untruth of their representations because

they were so situated that they either had particular means of ascertaining the pertinent facts, or their position made sufficient knowledge possible and their statements fairly implied that they had such knowledge.

30. These defendants had an economic interest and stood to make financial gain if the plaintiffs acted upon these representations.

31. The plaintiffs believed, were materially induced by and relied on these misrepresentations to their damage.

COMMON LAW UNFAIR COMPETITION

32. The allegations in paragraphs 1 through 31 above are incorporated by reference here as though pleaded verbatim.

33. The defendants Wohl, Brown Retail, Famous Footwear and XYZ were at all relevant times in competition with the plaintiffs in the retail sale of women's shoes. From June 11, 1987 to the present the defendants have engaged in unfair competition by virtue of the facts, circumstances and misconduct alleged above, and particularly because of the following:

a. Throughout the period just alleged, Brown Shoe Company and Brown Group discriminatorily imposed upon the plaintiffs the prohibition that they could not sell non-Naturalizer lines in their Naturalizer Specialty Stores, even

though Wohl, Brown Retail, Famous Footwear and XYZ were operating women's shoe departments in the same shopping malls, and Naturalizer Specialty Stores in other nearby locations, where both Naturalizer and other lines were being sold.

b. Brown Shoe Company, ABC and other divisions of Brown Group engaged in the discriminatory pricing referred to above.

c. Wohl, Brown Retail, Famous Footwear Company and XYZ sold Naturalizer shoes at retail prices which the plaintiffs, in view of the wholesale prices they were paying and other terms imposed on them by the defendants, could not reasonably match.

d. The defendants engaged in false and deceptive labelling and other false and deceptive marketing practices, such as labelling cheap and low quality merchandise as "Naturalizer" shoes and then offering them at supposed large discounts to the consuming public.

e. Brown Shoe Company, Brown Group International, Inc., other divisions of Brown Group and ABC secretly extended to Brown Retail, Wohl, Famous Footwear and XYZ, and to stores in which those companies operated women's shoe departments, special services and privileges not extended to the plaintiffs purchasing under like terms and conditions, which tended to injure and did injure the plaintiffs.

f. The defendants engaged in the other acts of unfair competition alleged above.

34. The unfair competition engaged in by the defendants was a proximate cause of the injuries and damages sustained by the plaintiffs.

ANTITRUST VIOLATIONS

35. The allegations in paragraphs 1 through 34 above are incorporated by reference here as though pleaded verbatim.

36. The agreements between the defendants Brown Group/Brown Shoe Company and the plaintiffs, and particularly the provisions therein relating to the so-called "standard of purity" and prohibition against the plaintiffs marketing lines other than Naturalizer lines constituted a contract in restraint of trade and commerce, in violation of Wisconsin Statutes Section 133.03. This restraint was unreasonable in that, among other things, it was without any restriction as to time or place, it was greater than required for the protection of the person for whose benefit the restraint was imposed, it imposed undue hardships and losses upon the plaintiffs and the Naturalizer Specialty Stores they operated, it injured competition generally and resulted in higher prices being charged to the public, resulted in certain products being foreclosed from purchase by the public, and was applied discriminatorily against the plaintiffs.

37. The defendants' said violation of Wisconsin Statutes Section 133.03 was a proximate cause of the injuries and damages alleged above.

38. By reason of the defendants' violations of Wisconsin Statutes Section 133.03 as alleged above, the plaintiffs were injured both directly and indirectly in their business and property, sustaining the damages alleged above, which damages are ongoing and exceed Two Million Dollars ($2,000,000). Accordingly, under Wisconsin Statutes Section 133.18, the plaintiffs are entitled to treble their damages, or an amount exceeding Six Million Dollars ($6,000,000), plus the cost of suit including reasonable attorney's fees.

STATUTORY UNFAIR TRADE PRACTICES

39. The allegations in paragraphs 1 through 38 above are incorporated by reference here as though pleaded verbatim.

40. In the course of their misconduct alleged above, the defendants Brown Shoe Company, Brown Group International, Inc., other divisions of Brown Group and ABC secretly extended to the defendants Brown Retail, Wohl, Famous Footwear and XYZ, and to stores in which they operated women's shoe departments, special services or privileges not extended to the plaintiffs purchasing under like terms and conditions, which injured and tended to injure a competitor, namely, the plaintiffs and each of the Naturalizer Specialty Stores operated by the plaintiffs, all in violation of Wisconsin Statutes Section 133.05.

41. The defendants' misconduct was a proximate cause of the injuries and damages sustained by the plaintiffs.

42. By reason of the misconduct of the defendants alleged above, prohibited by Wisconsin Statutes Section 133.05, the plaintiffs sustained the injuries and damages alleged above, entitling the plaintiffs under Wisconsin Statutes Section 133.18 to treble their damages, or an amount exceeding Six Million Dollars ($6,000,000), plus the cost of suit including reasonable attorney fees.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

(1) For damages on their claims for breach of contract, for antitrust violations and for unfair trade practices in an amount exceeding Two Million Dollars ($2,000,000), trebled pursuant to Wisconsin Statutes Section 133.18.

(2) For damages on their other claims stated herein in the amount to be determined at trial.

(3) For costs and disbursements herein, including reasonable attorney fees pursuant to Wisconsin Statute Section 133.18.

Dated: June 8, 1993.

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APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WESTOWNE SHOES, INC.,
and CARL A. BIWER COMPANY,

Plaintiffs,

vs. Case No. 93-CV-0720 (RTR)

BROWN GROUP, INC., BROWN SHOE COMPANY, BROWN GROUP RETAIL, INC., BROWN GROUPINTERNATIONAL, INC., ABC, XYZ and CITY INSURANCE COMPANY,

Defendants,

vs.

BARBARA B. SCHOENECKER and
RUDOLPH V. SCHOENECKER,

Counterclaim-Defendants.

Excerpts from
AFFIDAVIT OF RUDOLPH V. SCHOENECKER IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF WISCONSIN)
) ss.
COUNTY OF MILWAUKEE)

Rudolph V. Schoenecker, being first duly sworn, on oath, deposes of his personal knowledge and avers as follows:

1. I am one of the parties in the above entitled action. I am a shareholder in Westowne Shoes, Inc. ("Westowne") and Carl A. Biwer Company ("Biwer"), the plaintiffs, and I am also the president and chief executive officer of both companies. I am the husband of Barbara B. Schoenecker, also a party in this case. I reside at W278 N2780 Rocky Point Road, Pewaukee, Wisconsin 53072. I make this affidavit of my personal knowledge. To the extent any contents of this affidavit constitute an opinion, that opinion is based upon my background and experience in the footwear industry, in which I have spent substantially my entire life as more particularly described below, and I hold those opinions to a reasonable degree of probability. I make this affidavit in opposition to the affidavits and other papers filed by the defendants in support of their motions for summary judgment.

2. My wife Barbara and I were married in December, 1957 and we both graduated from Marquette University in 1958. Immediately upon graduation I joined my father-in-law, Carl A. Biwer, in the management and operation of his family shoe store business headquartered in downtown Waukesha, Wisconsin. Biwer had other stores, and I participated in the management of those stores as well.

From the time I began work with Biwer and thereafter, those stores always carried the Naturalizer line of shoes, so that over the years I became very familiar with the Naturalizer line.

3. In approximately 1970 representatives of Brown Shoe Company approached us proposing that we open a Naturalizer specialty store in a mall being developed in Madison, known as West Towne. As we investigated the possibility of doing so, we learned that another mall on the east side of Madison was being developed by the same people, and we advised Brown we would be willing to open Naturalizer specialty stores in both malls, which Brown wanted us to do. Brown explained to us that each of these would be a Naturalizer dealership. I was present at the deposition in this case of Marcus Lemp, and have also read the transcript of his deposition, and I agree with his description of the agreement between Brown and the Naturalizer dealers. That description is accurate also in describing the agreement between Brown and Westowne for each of the Naturalizer specialty stores ultimately opened and operated by Westowne. The same dealership agreement was made between Brown Shoe Company and Biwer for the Naturalizer specialty store (in La Crosse) which Biwer opened and operated.

4. Of particular importance to me in this agreement as the chief executive officer of the Naturalizer dealerships Westowne was opening, were the following: First, the use of the Naturalizer sign on the store front, which identified the store as a Naturalizer dealership. Naturalizer was already known as a quality shoe, very

comfortable and well-fitting, but one of our objectives was to help develop the brand identification for Naturalizer by having the store front sign display the name in the high-traffic area where the store would be located, namely a mall. The Naturalizer name at the time we began our stores was not nearly so well known as it is now, and there was not at that time the extent of public awareness as there later was, that the name stood for a quality line of women's shoes. In fact, Naturalizer was not even Biwer's number one women's brand at the time (Life Stride was), but we felt that by having the store front sign and providing high level service to the customers at the specialty stores, we could promote the Naturalizer brand effectively, and it was apparent that Brown wanted to support us in that effort and wanted the brand promoted as well. Ultimately, through our efforts and the efforts of the other dealers, the Naturalizer name became much better known, as described by Mr. Lemp in his deposition, until, as of 1987, it was the number one name in women's shoes, both in terms of brand identification and brand loyalty.

5. Secondly, it was important for me that Brown would be supporting our specialty store with a very good inventory system, which made it economically feasible for the specialty store to carry a broad range of inventory in terms of patterns, sizes and colors. This was crucial to the concept of a specialty store, because the specialty store's emphasis was and is on servicing the customer. As soon as popular patterns were sold, Brown's inventory system on the most important patterns permitted us to immediately replenish our inventory. This was called an "in-stock program" and meant that Brown would carry a large back-up

inventory of shoes likely to be reordered, and would fill reorders on shoes immediately. Thus, the dealers, including Westowne, could concentrate on breadth and variety of inventory, knowing that they could always call upon Brown's in-stock program for the key shoes to replenish the inventory.

6. Another very important part of the agreement was that we had access to the entire Naturalizer line, understanding that we would be in malls that would include transient traffic, as well as women who would be familiar generally with the Naturalizer line and its advertising, and we wanted to be able to respond to customer requests for patterns, having available in the store at least the patterns that we judged from year to year would be those likely to be sold.

7. It was recognized by both Brown and us from the very start that Naturalizer was not a complete line, and had voids in certain important classifications of women's shoes. It was therefore also very important to us as dealers, and Brown agreed, that to the extent we felt it important to respond to the market, we were entitled as Naturalizer dealers to supplement the Naturalizer line by outside lines. These outside lines varied from time to time depending on market demand. For example, when we first opened the West Towne and East Towne stores in Madison, we carried over 500 pairs of Sandler stretch boots, which were not manufactured by Brown or a Brown affiliated company. When, within approximately a year, Brown began successfully to produce a stretch boot in the Naturalizer line, we purchased and sold those and discontinued the Sandler

line. Similarly, our specialty stores carried Bandolino sandals for most of the 1970's, until the market changed and Bandolino dropped that line. We also carried Sebago moccasins through the 1970's until the mid-1980's, since those shoes were not produced in a Naturalizer version. As described more fully below, during the 1980's the comfort casual classification of women's shoes became increasingly important, and beginning in 1984 our Naturalizer specialty stores began carrying the comfort casual shoe line manufactured by San Antonio Shoe Company ("SAS").

8. As an additional part of our dealership agreement with Brown, Westowne and Biwer agreed that each of its dealerships would market the Naturalizer line as its principal line and carry an adequate stock in the Naturalizer line, so as to have Naturalizer shoes available across a good spectrum of customer needs. Throughout the entire relationship between Westowne and Biwer on the one hand and Brown on the other in respect to these Naturalizer specialty stores, our stores were never once criticized by Brown for not having an adequate inventory of Naturalizer shoes, either in terms of variety or amount. To the contrary, Brown from time to time would comment (always favorably) on our inventory and selection of patterns, sizes and colors, and was consistently complimentary about the product mix and size of our inventory, the management and appearance of our stores and the personnel. Brown had a special marketing organization trained for and concentrating on support of the Naturalizer specialty stores, and also had regular contact with our stores through their sales representatives who serviced the stores. These sales representatives would regularly be in our stores often,

frequently on a once or twice a week basis, so that there was substantially continuous contact between our stores and these Brown representatives and they knew essentially at all times how our stores were being operated. Brown also supplied us, as dealers, with credit and provided support to us for store design, advertising assistance and other, similar support.

9. I was the principal person dealing on behalf of the Westowne and Biwer stores with Brown home office personnel on matters of credit, ordering shoes and other typical contacts between a wholesaler and a retailer. Westowne and Biwer regularly bought shoes from Brown on a credit basis and I regularly supplied to Brown Westowne financial statements and other financial information in connection with that credit relationship.

* * * * *

14. Starting with the first Naturalizer stores opened by Westowne and continuing into the 1980's, Biwer and Westowne contributed in a significant way to the image, popularity and brand loyalty of Naturalizer shoes. This was done primarily by developing our Naturalizer stores and in the process providing, through training and management, effective service and offering merchandise to meet customer expectations. In providing effective service for our customers, our sales people were trained to counsel customers on style and color coordination as well as on fit and comfort. They did minor repairs such as replacing buckles and eyelets or sewing up stitching free of charge. They arranged for major repairs, telephoned customers to advise them of incoming shoes the customer liked and they made special orders for shoes requested by the customer.

Biwer and Westowne additionally contributed to the Naturalizer image and reputation by annually investing approximately $65,000 in advertising the Naturalizer name and Naturalizer shoes. By concentrating on selection and service for the customer, our specialty stores, like others throughout the country, became, according to Brown, "one of the most sought after entities" in the shoe industry (*see*, Exhibit 15).

* * * * *

20. In 1984, when SAS shoes were introduced into the inventory at each of the Naturalizer stores, they quickly became an important and profitable part of our product mix.

21. As of the time we introduced SAS shoes in our inventories at the Naturalizer stores, to my observation as an experienced person in the shoe business, the trend among the customers at our Naturalizer stores, like consumers elsewhere, was towards a more comfortable casual shoe. The SAS shoe, particularly for the typical customer at our Naturalizer stores became a very popular and successful shoe. Typically, SAS shoes constituted approximately 10% of the inventory but produced at least 20% of total sales volume. Based on the growth of popularity and acceptance of SAS shoes among our customers, and in view of the extent to which sales volume from relatively small percentages of SAS inventory has increased in Naturalizer stores that have continued to carry SAS shoes through the 1980's and into the early 1990's, I would estimate that if our Naturalizer specialty stores had been allowed to continue carrying SAS shoes as approximately 10% of our inventory, it would have, by 1990 and beyond, accounted for at least 30% of total volume such as has occurred in other

Naturalizer stores which have continued to carry SAS shoes as approximately 10% of total inventory. We found in our Naturalizer stores when we were carrying SAS shoes that they seldom had to be discounted because they became "classics" that stayed in style and in demand year after year. They were easily reordered and readily delivered. Selling SAS shoes with such regularity and replacing them as they became sold, particularly because they did not have to be marked down in order to be sold, made the sale of SAS shoes especially profitable.

22. Further, having an accepted quality comfort casual shoe regularly sought by our customers assisted in the sale of our Naturalizer shoes, which was the bulk of the inventory at our stores. Largely because having SAS shoes in our stores we achieved "multiple sales" which resulted from customers coming into the stores to buy SAS comfort casual shoes, with the customers then being shown and ultimately sold a pair of Naturalizer dress shoes as well. On the other hand, customers would come in looking for a Naturalizer dress shoe and would also be shown the SAS comfort casual shoe. Very frequently, even customers who had never tried on SAS shoes in our stores would be shown and would try on an SAS shoe, would find it extremely comfortable and would thereafter be a regular purchaser of SAS shoes at our store, often purchasing a Naturalizer dress shoe as part of a multiple sale. This combination of having a quality, comfortable, popular comfort casual shoe such as SAS and a recognized line of quality Naturalizer shoes contributed substantially to the success and profitability of all of our Naturalizer stores.

23. In operating our Naturalizer stores and selecting the product mix for inventories in those stores, it was important to respond to changing market demands and, as of the middle 1980's, carrying SAS shoes was one of the ways in which Biwer and Westowne were responding to the current market demands.

24. As of 1987, it was important for the economic viability of all of our Naturalizer specialty stores to have, in regular supply, a comfort casual shoe like SAS shoes acceptable to our customers and at the same time, to have in regular supply adequate stocks of popular Naturalizer dress shoes delivered timely, particularly to meet advertised sales and, importantly, to get timely replacement or replenishment in inventory in Naturalizer shoes when inventory became depleted by sales of shoes.

25. With the ability to maintain a product mix to meet customer demands, a regular customer base consisting of women, usually mature women for whom fit and comfort rather than high fashion or bargain prices were primarily important, and who wanted a good price/value relationship, our Naturalizer stores were maintaining good volume and profitable operations on a consistent basis and SAS comfort casual shoes contributed significantly to that volume and those profits.

* * * * *

30. In late 1986 and very early 1987 I became aware that Naturalizer would be introducing its own comfort casual shoe styled after the SAS comfort casual shoes we had been selling successfully since 1984. Our Naturalizer sales representative, Jim Pinson, told me of these shoes and

showed our store managers and me samples of new Naturalizer comfort casual shoes. The Naturalizer comfort casual shoes were called the Grenada, Russett and Utah, duplicating and styled after corresponding SAS styles known as the Bounce, Magic and the Classic. When he showed us these samples, Pinson informed us that Naturalizer had set about to achieve and had successfully achieved making a "stitch-for-stitch" knock-off of the SAS comfort casual shoes we had been carrying in our Naturalizer stores. In discussing with Pinson whether or not we should add Naturalizer's Grenada, Russett and Utah series along with SAS shoes, I discussed with him the importance of the fact that SAS shoes had been so successful for us because they remained in style and in demand each year and that with the continuing production of these shoes by their manufacturer, San Antonio Shoe Company, we were able to get timely delivery on our orders of these shoes, including fill-ins to replenish inventory. Pinson acknowledged this was important and told us Brown's Naturalizer division was committed to its Grenada, Utah and Russett series, that Naturalizer wanted its dealers to carry this series on a continuing basis and that this series of shoes could and would be supported by a strong in-stock program through which Naturalizer could fill our orders and reorders as effectively as SAS had filled them.

31. Pinson urged me to purchase some of these shoes for our inventories. I decided to do so. While it was my intention to continue carrying the SAS styles we had carried since 1984 because of our success with those shoes, I thought it would be good to also carry Naturalizer's version of these comfort casual shoes to challenge the SAS shoes, by

offering customers a choice between SAS comfort casuals and the Naturalizer version Pinson was presenting on behalf of Brown.

32. Attached hereto as Exhibit 2 is a copy of the Naturalizer price list, revised as of March 24, 1987, in which Brown's Naturalizer division identified the Naturalizer shoes that were available at that time for the dealers to order for delivery. This document was obtained in discovery in this case; copies of it were given to us by Pinson in early 1987. This document, at pp. 012014, 012023 and 012025, represents that Naturalizer's Grenada, Russett and Utah series, its "knock-offs" of corresponding SAS patterns, were represented as available for delivery in the fall of 1987 in a good variety of colors.

33. Shortly after June 11, 1987, I received and read Exhibit 3 which is the June 11, 1987 letter to me from Edgar Enslin, Jr., vice president and director of specialty stores for Brown Shoe Company. In that letter Enslin referred to Brown's early identification of the need for its specialty stores to serve their customers "with a broad selection of well-styled footwear in sizes and widths, manufactured to the Company's high standard of quality and fit." The letter also stated that "significant capital investments have been made to maintain a strong domestic production resource augmented by import capabilities that enables us to maintain our competitive advantage on product, in-stock programs, delivery and so on." The letter also stated, "Also, recently there has been a focus on product development to insure that the Naturalizer line offers a complete and balanced selection across all the major

classifications of women's footwear." The letter went on to state Brown had adopted a policy under which Naturalizer stores would be allowed by Brown to carry only Naturalizer shoes and that we would be expected to be in compliance with this policy on or before March 1, 1988.

34. By the time I read Enslin's letter, Naturalizer sales representative Pinson had already shown our managers and me a sample of the Grenada, Russett and Utah, Naturalizer's new SAS type comfort casual shoes, and we had already made the decision to carry those shoes to challenge the SAS shoes, as stated above, and they were on order. Accordingly, consistent with the testimony I personally heard Enslin give in his deposition in this case, that by his statements in his June 11, 1987 letter he intended to communicate to the Naturalizer dealers that Brown had and could offer an SAS type comfort casual shoe meeting Naturalizer's usual standard of quality and fit and that Brown was in a position to support the shoes with regard to delivery and an in-stock program (Enslin testimony at p. 78), I understood Enslin to be telling me in this letter that Naturalizer had achieved making an SAS-type comfort casual shoe meeting Naturalizer standards of quality and fit, that Naturalizer was in a position to offer these shoes at that time and could support the dealers' purchase of that product with a strong in-stock delivery program.

35. When I first received Enslin's June 11, 1987 purity letter from Brown, I was concerned about Brown's representations that it now had a Naturalizer line ("manufactured to the Company's high standard of quality and fit") offering "a complete and balanced selection across

all the major classifications of women's footwear." I knew the growing importance of the comfort casual classification, and the danger of discontinuing the high profit SAS shoes without first being confident Brown was in a position to supply Naturalizer comfort casuals "manufactured to the Company's high standard of quality and fit," so that Brown truly could "insure" that Naturalizer could meet market demand "across all the major classifications of women's footwear."

36. Accordingly, I made numerous phone calls to Brown officials and conferred in Madison with the Brown sales representative, Pinson. In these conferences Pinson and the other Brown officials repeatedly described the new Naturalizer comfort casual patterns (the "Grenada, "Russett" and "Utah"), as "stitch-for-stitch" copies of the SAS shoes our stores had been successfully selling.

37. Although we had ordered the Naturalizer versions to "challenge" the SAS shoes we regularly were carrying, we had not received any, and so we had no market experience with them as of that time. I therefore sought and received direct assurances from these Brown officials that Naturalizer indeed had and could supply Naturalizer-level quality "stitch-for-stitch" duplicates of the SAS shoes.

38. From reviewing my date book for the year 1987, I can state that it was on June 17, 1987 that we met with Pinson. At that time he gave our managers and me the latest Naturalizer price list dated June 11, 1987, effective June 6, 1987 which depicted the various Naturalizer products that could be ordered for delivery for early spring 1988. A

copy of that document is attached as Exhibit 4. In addition to showing the products and stating the cost and suggested retail prices, this document also indicated the colors and sizes in which the shoes depicted therein would be available. As they had been in Exhibit 2, Naturalizer's Grenada, Russett and Utah series were also included in Exhibit 4, showing these shoes as being available in a wide variety of colors and sizes. In these discussions among Pinson, our managers and me, Pinson repeated his assurances that with the Grenada, Russett and Utah series, Naturalizer had duplicated the corresponding SAS patterns "stitch-for-stitch," that they were excellent shoes and that Naturalizer could support them with a strong in-stock and delivery program so that we need have no concerns about agreeing to eliminate SAS shoes and going pure.

39. In addition to these discussions with Pinson in which I participated, I had a series of telephone discussions with Brown executives, including Ed Enslin and Walter Nizinski, then vice president and general manager of Brown's Naturalizer division, about Naturalizer's new comfort casual shoes and Brown's ability to support delivery of these shoes to us through an in-stock program.

40. In these discussions, both Enslin and Nizinski repeated the assurances we had been given by Pinson that the Naturalizer division had successfully "knocked-off" the SAS comfort casual shoes, that the shoes they had produced were quality shoes that were comfortable and fit well and that Brown had the capability to deliver these shoes to us on a timely basis, supported by a strong in-stock program. Enslin and Nizinski also told me that in view of Naturalizer's

success in duplicating the SAS shoes we had been carrying and in view of Brown's commitment to support our sale of these shoes with a strong in-stock program, there was no further need for us to carry SAS shoes as an outside line and we could safely agree to eliminate SAS shoes from our stores as we had been directed to do by Enslin's letter of June 11, 1987. I have reviewed our telephone records for the period between June and September, 1987 which reflect a large number of telephone calls between our office and Brown which include my discussions with Brown executives regarding Naturalizer's new comfort casual shoes and our eliminating SAS shoes referred to above.

41. While giving me the reassurances described above, the Brown officials repeatedly made clear also that if we did not go "pure," Brown would insist on terminating the Westowne and Biwer Naturalizer specialty store franchises. Then and thereafter, Brown's shorthand way of expressing franchise termination was that the "Naturalizer sign would have to be removed." As dealers were told then and thereafter, the store operator could run his own multi-line store and could continue to buy Naturalizer shoes like any other retailer, but dealership benefits would be terminated and Brown could then set up its own Naturalizer specialty store in the same mall.

42. If I had had a free choice about "purity," I certainly would not have agreed to exclude outside lines from the plaintiffs' specialty stores. I knew the absolute importance of having outside lines to offer as we had in the past and were doing in 1987 with SAS, and so it was important to me that Westowne and Biwer be free to

supplement the Naturalizer line with other lines where market demand required it. However, Brown was insisting that the plaintiffs either accept the purity program or give up their franchises. I understood and Brown's officials agreed that by its "purity letter," Brown sought to impose on us an amendment to our dealership agreement. Until June 11, 1987, the independent dealers had been free to supplement the Naturalizer line with other lines such as SAS. Had I remained concerned about Naturalizer's ability to supply us with a quality comfort casual shoe to substitute for the SAS, or had I believed some of the independent dealers would be allowed to continue carrying outside lines while still retaining their dealership and others not, I would not have agreed to purity and would have consulted an attorney to pursue such legal remedies as were available to me.

43. However, after receiving the direct assurances from Brown officials and becoming satisfied the statements in Enslin's June 11, 1987 purity letter were true and the promises both contained therein and expressed to me by Brown officials would be kept, I capitulated to Brown's demand and agreed to go "pure."

44. In doing so I understood I was agreeing to the change being imposed by Brown in Enslin's letter of June 11, 1987 (that we were no longer allowed to carry outside lines and were required to eliminate them if we wanted to continue operating as Naturalizer specialty stores under the Naturalizer sign) and that in exchange for our agreement to go pure and eliminate our SAS shoes, Brown agreed and promised to supply us, on a continuing and in-stock basis, with the inventory we would need of the Grenada, Russett

and Utah comfort casual shoes which Brown had assured us it had produced as Naturalizer-quality "stitch-for-stitch" duplicates or "knock-offs" of the corresponding SAS comfort casual shoes.

45. Having made the decision, on behalf of Biwer and Westowne, to eliminate SAS shoes and to go "pure" as directed by Brown, I directed all of our managers to eliminate all SAS shoes by March 1, 1988, and I told them we would be replacing these shoes with Naturalizer's Grenada, Russett and Utah series. Shortly thereafter, I confirmed this by my letter to Ed Enslin dated September 18, 1987 which is attached hereto as Exhibit 5. I note in Brown's summary judgment brief that it suggests at some point since 1987 one or other of the plaintiffs' Naturalizer specialty stores was not "pure." That is incorrect. What Brown is apparently referring to are a relative handful of rare instances where customers asked us to make a special order of SAS shoes even though we were no longer carrying them. Or, perhaps, Brown is referring to the fact that at some end-of-season clearance sales we would sometimes fill in product from various other manufacturers (which could include SAS) in the sale merchandise to fill in gaps. That latter was done with the full knowledge and approval of Brown people, who in fact participated in these sales actively on at least one occasion. Further, such occasional purchase and sale of an outside line has no real relevance to purity, which pertains to whether a store carries a line in the regular course of business. This is all confirmed, of course, by the fact that Brown constantly monitored our stores, with its field representative being in our stores several times a month, and actually reported on the monitoring in 1992 and found our

stores "pure." *See*, Exhibit 48 hereto. Interestingly, after this litigation was commenced, I undertook to try to reinstitute SAS as a supplemental line in our specialty stores in order to mitigate damages. However, just after I did so, Brown subpoenaed SAS records in this case and SAS terminated shipments and indicated they would not sell shoes to the plaintiffs' stores because they were concerned about getting involved in a lawsuit.

46. Brown quotes a part of my deposition as saying I did not "believe" certain statements in the June 11, 1987 purity letter when I first received it, although elsewhere in the same deposition I testified that I did believe the statements. Compare April 15, 1994 transcript at 167-70, cited by Brown, with April 18, 1994 transcript at 103-106 (I believed in and relied on Enslin's representations and promises), April 20, 1994 transcript at 16-17 (I accepted and believed statements and promises within the next couple of weeks following the June 11, 1987 Enslin letter), and April 21, 1994 transcript at 58-63 (I believe the statement was true but was concerned about it). These portions of this testimony are attached as Exhibit 6. My description of my beliefs, concerns and decision to eliminate SAS shoes and go pure as described above is consistent with the testimony I gave on these topics when questioned about them at various times over the four and one-half day deposition I gave, considering all of my testimony as a whole, and, of course is confirmed by my contemporaneous letters to Brown.

47. As I told Enslin in my letter to him of September 18, 1987, Exhibit 5: "I sent a copy of [the Enslin purity letter] to all our managers with instructions to

eliminate all SAS shoes by March 1, 1988, and told them we would be replacing these shoes with the Grenada, Utah, Russett, etc.," I did have all SAS shoes removed from all of our Naturalizer stores. Our specialty stores thereafter remained pure, carrying only Naturalizer shoes in their inventories, in compliance with our amended agreement with Brown. The only instances of sales of SAS shoes after we went pure involved rare and exceptional circumstances Brown was aware of and had no objection to. This involved rare, special orders for a pair of SAS shoes for occasional customers who in prior years had bought SAS shoes from us and could not conveniently find them. Other circumstances involved occasional clearance sales where, like other dealers, we routinely brought in other product to fill in gaps, and, from to time these fill-in products included non-Naturalizer lines. Again, these infrequent situations were known to Brown and Brown approved them and never regarded them as violating our agreement to remain pure. To the contrary, on one such occasion, Brown executives were present at a sale where non-Naturalizer product was included, helped with the sale and were completely aware of these circumstances and made no objection.

48. In my September 18, 1987 letter to Enslin, I also stated we had difficulties in receiving shipments of the shoes, and I asked whether we should reorder SAS shoes until the Naturalizer shoes could be shipped. I further suggested an extension of the "purity" deadline from spring 1988 to fall 1988. Brown did not respond to that letter. However, in the spring of 1988, a number of Brown officials met with my wife and me in Milwaukee. They reaffirmed the "purity program," and, although I received an extension

of the deadline to the summer of 1988, the Brown officials reaffirmed that we could not violate "purity" without forfeiting our franchise. At this time these Brown executives acknowledged they had problems with the Naturalizer versions of the comfort casual shoes, but they assured me that these problems would be worked out. This did not occur. Brown never did produce a comfort casual shoe of Naturalizer quality, nor one that could be reasonably regarded as equivalent to any of the SAS comfort casual shoes I carried before "purity," as described earlier in this affidavit. From time to time in this litigation, Brown has suggested that its so-called "Charger" shoe might be in that classification, but it clearly is not, and Mark Lemp, Jr., and Walter Nizinski have given deposition testimony in this case confirming that the Charger is a completely different type of shoe.

49. On January 9, 1989, I again wrote a letter to Enslin. See letter including pages marked as 000975 and 000976 in series of documents attached as Exhibit 7. I pointed out in that letter that Naturalizer had not "lived up to its part of the bargain, and that as a result of the combination of having removed the SAS shoes and not receiving replacements, we had suffered a loss in sales volume of $177,000 over an 11 month period from the inability to sell comfort casual shoes and additional losses in sales of traditional Naturalizer shoes because of not having an inventory of comfort casual shoes. I pointed out that the Utah comfort casual produced by Brown "didn't fit and was dropped," the Russett had been dropped and that the Grenada was being dropped. Exhibit 7 attached hereto, which includes a copy of my letter of January 9, 1989, is a series

of documents produced by Brown from the files of Robert Stone, who, at that time, was director of the independent retailer division for Brown Shoe Company. Also included in that series of documents is a copy of a memo with which Stone referred my letter to Robert Stenzl, then in charge of the western region for Brown's Naturalizer independent retailer division. In the memo Stone asks Stenzl for his comments on my letter. As shown on page 000973 of Exhibit 7, Stenzl not only had extensive experience as regional a director of the independent retailer division, but also had extensive experience as a retailer in the shoe business. The substance of his response to Stone was that he agreed with me.

50. As indicated above, a principal inducement for us to become Naturalizer dealers originally was Brown's assurance and commitment that it would maintain production capability and an in-stock program sufficient to fill our orders and to replenish our inventory by filling reorders as they were needed. In my letter to Enslin of January 9, 1989 referred to above, after describing our increasing problems with purity, I pointed out the difficulties our stores were experiencing by not receiving shipments of two basic Naturalizer dress shoes, the Venice and the Royal. As I stated in my letter, by adding to the purity difficulties "...the fact we were unable to get Venices and Royals in mid-season, the problem for us gets gigantic." See January 9, 1989 letter attached as part of Exhibit 7.

* * * * *

52. Testimony from Brown officials and other documents produced in this litigation show that Wohl Shoe Company stores, owned by Brown, may request that Brown

add certain styles and patterns to their regular branded lines. If Brown determines not to adopt these items, Wohl may choose to independently source them as supplemental product labeled with Brown Shoe brands. This privilege of being able to obtain needed shoes to fill voids in the Naturalizer line was not ever afforded to any of our stores or, as far as I know, to other independently owned specialty stores, from the time the purity requirement went into effect to the present time. The documentation referred to above (See Exhibit 78) shows that both for its company owned specialty stores and for the shoe departments it leased in department stores in the same malls where we operated our stores, Wohl could obtain shoes at 15% less than the price we were required to pay for the same shoes. Also, as indicated above, Wohl was able to preempt Brown's inventory on important shoes, exhausting the availability of popular patterns we needed in our stores. In my opinion this is unfair competition from Wohl. It is compounded by Brown's opening of a discount mall in Kenosha, which sells, at discounted prices, standard Naturalizer shoes, plus cheap shoes that are given a "Naturalizer" name and then sold at huge discounts.

* * * * *

54. For the past several years, an affiliate of Brown Shoe Company, Wohl, has been engaged in the acquisition of Naturalizer specialty stores, which earlier had been opened and operated by independent dealers such as Westowne and Biwer. Throughout the time that is involved in this case, Wohl has operated these specialty stores and also has operated shoe departments leased from department stores, including a department store shoe department in each of the malls where the plaintiffs have had a Naturalizer specialty store. It is my understanding that as of the

June 11, 1987 Enslin purity letter, approximately half of the 621 Naturalizer specialty stores then in existence were owned by Wohl. An internal Brown document relating to Brown's acquisition of the specialty stores is attached to this affidavit as Exhibit 28. In March 1993 I was in St. Louis and met with the president of Wohl, Ray Moseley. Moseley described to me Wohl's activities in respect to acquisition of formerly-independent specialty stores, and in particular those Wohl was acquiring from a large group of specialty stores under common ownership which had gone into bankruptcy. Moseley explained to me that he felt this was very advantageous to Wohl, because it was in a position to pick and choose exactly which stores and which markets Wohl wanted to have. Moseley told me it was "much cleaner" to be able to pick up just a few stores that way, without having also to pick up other stores in less desirable locations.

* * * * *

64. Attached as Exhibit 10 is a letter to me from Brown dated January 4, 1978 which is part of the agreement between Brown and us as a Naturalizer dealer in which Brown stated our use of the Naturalizer name was contingent on our maintaining and offering "adequate stocks" of Naturalizer shoes.

* * * * *

70. Attached as Exhibit 16 is a document obtained from Brown which is a memo dated March 24, 1987 which includes the summary marketing planning schedule for the years 1988-1990, making reference to "strategic plans" to be discussed by executives at Brown. Attached as Exhibit 17 is a copy of the Naturalizer strategic review referred to in Exhibit 16. This document, on its 7th page refers to

Naturalizer's plan to implement a "purity program" with the "rationale that Brown can substantially increase its gross profit by capturing the approximately 15% of the volume of its specialty stores from their sales of outside lines.

* * * * *

72. Attached as Exhibit 19 is Naturalizer division's price list, dated July 25, 1988, including Naturalizer shoes that were to be available for delivery in early spring 1989. this document was obtained from Brown and shows that as of that date the Russett and Utah Naturalizer comfort casuals which Naturalizer had promised would remain available to us on an in stock basis, had already been dropped from the Naturalizer line.

73. Attached as Exhibit 20 is Naturalizer's price list dated December 18,1989 showing that as of that date, Naturalizer's Grenada comfort casual was completely dropped from the Naturalizer line. Substantially prior to that time only limited sporadic sizes and styles of the Grenada remained. I was personally present during the testimony of Larry Brimer, Brown's former merchandising manager, who testified that the reason the Grenada lasted longer than the Utah and the Russett was that more of these shoes had been manufactured originally and it took longer before Brown could get rid of this pattern.

* * * * *

75. Exhibit 28 is a Brown memorandum produced in this action dated August 21, 1987 describing the "Naturalizer specialty store acquisition program," referring to a Brown Group strategy of acquiring Naturalizer specialty stores and discussing whether, in furtherance of that strategy, Brown should attempt to open up specialty stores in the

markets of existing dealers. The memo concludes that Brown should continue its policy of not interfering with the independent dealers' exclusive right to store operations in their own markets because to do so would "result in significant dealer reaction problems, particularly on top of the purity program that is currently being implemented." The memo concludes, however by stating that "Brown Group should continue to pursue an aggressive strategy of acquiring independent dealers."

76. Exhibit 29 is a document produced by Brown, a copy of which was also sent to our stores. This is a document prepared by Enslin of the Naturalizer division who testified the document was mailed to the independent Naturalizer dealers in September of 1987. This document explains the categories of Naturalizer shoes available at that time and makes suggestions about the percentage of inventory the various classifications should represent. In that document, Brown specifically lists and identifies its SAS type knock-offs, the Grenada, Russett and Utah, as shoes that it has available. It also includes those shoes within a category of "carry-over footwear." The significance of identifying Brown's SAS type comfort casual shoes as carry-over footwear that is available at that time is that Brown was thereby representing it had and could deliver these shoes as shoes that would remain in stock on a season to season basis.

* * * * *

86. Exhibit 40 is Brown interoffice correspondence listing a number of independent dealers as of May 25, 1990 who were still carrying outside lines.

87. Exhibit 41 is a list of independent dealers identifying a number of dealers who were "not pure."

88. Exhibit 42 is another list, prepared by Brown, of "Naturalizer specialty store dealers to be addressed regarding purity," listing 28 such dealers and indicating that many of them are continuing to carry SAS or similar type shoes.

* * * * *

93. Exhibit 47 is Brown interoffice correspondence dated November 21, 1991 noting that with regard to a New Jersey independent Naturalizer dealer, Brown had "looked the other way" even though that dealer had not gone pure, also noting that dealer was continuing to carry SAS shoes.

* * * * *

104. Exhibit 58 is a Brown interoffice memo dated March 30, 1992 referring to the fact that a number of independent dealers had to put in outside lines, including SAS, that "Naturalizer's poor in-stock program" and discounting by other Brown outlets was making it difficult for them to "stay in business" and noting that Brown's independent dealers were having "more credit problems today than ever."

* * * * *

107. Exhibit 61 is a Brown interoffice memo dated May 14, 1992 stating "we can expect our telephones to ring off the hook next week" from independent dealers because of advertising showing Brown was giving price and product availability preference to its Wohl stores over the independent dealers.

108. Exhibit 62 is a Brown interoffice memo dated June 5, 1992 listing a number of stores that were identified as being "purity/sign problems as of that time."

* * * * *

118. Exhibit 72 is Brown interoffice correspondence dated November 19, 1992 from Mark Walsh, Brown's head of Naturalizer specialty stores to Joe Pearce, executive vice president of marketing, transmitting the results of a survey completed by the independent dealers. This document shows that Brown's own summary of the problems in late 1992 acknowledged that the "in-stock" problem for dealers was of major concern and that "the need for casuals within the line is well known by everyone within Naturalizer and is really a manufacturing issue. We have to get it done. Plug the hole quickly, and it may need a band-aid!" The document, at page P 12053, describes the major concern of the dealers about problems in reordering shoes and, at page P 12056 says that there is "a real need for casual shoes."

* * * * *

128. Exhibit 82 is a series of correspondence from March to May, 1993 relating to the report by an independent dealer in South Dakota regarding a meeting in February, 1993 among owners representing 59 independent Naturalizer stores who were concerned that their "poor and eroding margins" were being caused by unfair competition from Brown, insufficient product and voids in the casual line. These dealers reported they would have to "remerchandise, or face further losses."

* * * * *

130. Exhibit 84 is an interoffice memo written by Mark Walsh, vice president in charge of independent specialty stores for Brown. I was personally present when

Walsh testified at his deposition in this case that this document was written regarding the concerns of the dealers expressed by Mr. Hanson in Exhibit 82 referred to above. In Walsh's memo he acknowledges there is an "erosion of dealer gross margin" that can be corrected by Brown's "improved product mix and some margin oriented programs." In that memo, Walsh also acknowledges that "the voids in the line have created a volume problem."

* * * * *

133. Exhibit 87 is Brown interoffice correspondence dated April 2, 1993 regarding Steven Green, the Naturalizer dealer in Fargo, North Dakota. This memo acknowledges Green's Naturalizer store had suffered "dramatic volume loss" which he attributes to the fact that he was forced to remove SAS shoes from his store.

* * * * *

Rudolph V. Schoenecker

Subscribed and Sworn to before me
this 12th day of July, 1994.

Joanne Broderick, Notary Public
My Commission Expires: January 21, 1996

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WESTOWNE SHOES, INC., and
CARL A. BIWER COMPANY,
Petitioners-Plaintiffs-Appellants,
vs.
BROWN GROUP, INC., BROWN SHOE COMPANY, BROWN GROUP RETAIL, INC., BROWN GROUP INTERNATIONAL, INC., FAMOUS FOOTWEAR COMPANY and WOHL SHOE COMPANY,
Defendants-Appellees.

Appeal No. 96-1955

Appeal from the United States District Court
for the Eastern District of Wisconsin,
Case No. 93 C 720,
The Honorable Rudolph T. Randa, Presiding

Excerpts from
BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF JURISDICTION

The district court had diversity and removal jurisdiction under 28 U.S.C. §§ 1332 and 1441. The parties are:

1. The plaintiffs Westowne Shoes, Inc., and Carl A. Biwer Company, both Wisconsin corporations located at Waukesha, Wisconsin.

2. The defendant Brown Group, Inc., Brown Shoe Company, Famous Footwear Company, Brown Group Retail, Inc., Wohl Shoe Company and Brown Group International, Inc., all Missouri corporations located at St. Louis, Missouri.[1*]

Jurisdiction of this court is based upon 28 U.S.C. § 1291 to review a final judgment entered in the district court March 19, 1996. The notice of appeal was filed April 15, 1996.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are there issues of material fact requiring a trial of plaintiffs' breach of contract claim?

[1*] Another defendant, City Insurance Company, has been dismissed from the case. *See* this court's April 11, 1996 order in Appeal No. 95-2328, App. 70. Hereafter, this brief uses endnotes.

2. Are there issues of material fact requiring a trial of plaintiffs' promissory estoppel claim?

3. Are there issues of material fact requiring a trial of plaintiffs' misrepresentation claim?

4. As to plaintiffs' Wisconsin antitrust law claim,

   a. Is the federal court bound by Wisconsin's statement of Wisconsin antitrust law?

   b. Were the plaintiffs entitled to a trial of their claim under Wisconsin antitrust law?

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The plaintiffs (collectively, "Westowne")[1] operated several Naturalizer women's shoe stores in Wisconsin shopping malls under dealership agreements with Brown. They contend Brown breached the agreements by failing to supply shoes it promised and by violating other promises expressed and implied in the dealership agreement. Westowne also alleges promissory estoppel, having relied on Brown's broken promises to provide shoes; that Brown misrepresented it had certain Naturalizer shoes available when in fact it did not; and that Brown forced it and other dealers to exclude outside brands from their stores in violation of Wisconsin's antitrust laws. Wisconsin law

applies. *Erie v. Tompkins*, 304 U.S. 64 (1938). The district court summarily dismissed all claims.

II. COURSE OF THE PROCEEDINGS BELOW.

Westowne commenced this action in state court June 8, 1993. Brown removed it to the district court based on diversity. After extensive discovery, Brown moved for summary judgment. R. 43. The district court's unpublished decision summarily dismissed all Westowne claims, leaving Brown's counterclaim against Westowne and others for claimed debts. App. 2.

Westowne moved alternatively for reconsideration or for an interlocutory appeal. R. 122. The district court denied both motions. App. 41. The counterclaims now being dismissed, Westowne appeals from the summary judgment.

STATEMENT OF FACTS

A. BACKGROUND OF NATURALIZER DEALERSHIPS.

Brown manufactures "Naturalizer" shoes, a moderately-priced line of women's shoes emphasizing comfort, understated styling and the industry's highest standards of quality and fit. It is principally a dress shoe line that historically did not include a "comfort casual" shoe. App. 577, 764, 770-73.

Naturalizers are retailed primarily through a network of Naturalizer dealerships which Brown calls "dealers" or "Naturalizer specialty stores." App. 249, 319. They are also sold in department stores, family shoe stores and discount houses. App. 336-38, 775-77.

Naturalizer dealers depend on an "in-stock" program, under which Brown maintains a large inventory of Naturalizer shoes from which dealers can immediately replenish stock. App. 105. This permits dealers to carry the complete Naturalizer line without tying up capital in a large on-site inventory. App. 105, 107-08, 111-12, 841-42, 959, 990-91.

Brown official Lemp, who developed the Naturalizer dealership network, describes the "mutual agreements" between Brown and its dealers as relatively informal but substantially the same in content for all. App. 774-75, 787-90. Typically, a specialty store was located in a mall or other high traffic area. App. 789. Brown sold its dealers storefront Naturalizer signs for $1.00. App. 790. Dealers agreed to purchase Naturalizer shoes and concentrate on selling that brand and Brown committed not to put another Naturalizer dealership within a competitive radius. App. 790-91. Brown and the dealers engaged in extensive joint advertising to promote the Naturalizer name. App. 895-96. Brown provided a special sales support force and agreed the dealers could obtain the full Naturalizer line and have first priority on reorders. App. 792. Being supported by the centralized inventory, dealers could direct their capital toward breadth rather than depth of inventory, offering the full Naturalizer line in a wide spectrum of colors

and sizes, and concentrate on fashion counseling and related customer services. App. 105. Brown knew it was "not providing the complete mix of merchandise necessary to operate a store 100% on Naturalizer," so the dealer "was free to supplement Naturalizer inventory with outside lines." App. 106-07, 115-18, 239, 246, 793-96. Dealers usually did this with "comfort casual" shoes because Naturalizer had a void in that classification and the dealers found having them essential to profitability. App. 106-07, 115-18, 796-99. A line typically chosen was manufactured by San Antonio Shoe Company ("SAS"). App. 106-07, 115.

Lemp of Brown and Schoenecker of Westowne give essentially the same description of the agreement between Brown and its dealers. Lemp, App. 774-801; Schoenecker, App. 103-08.

B. DEVELOPMENT OF THE WESTOWNE (AND BIWER) DEALERSHIPS.

Brown made Naturalizer dealership agreements with "only the best people in the United States." It chose Westowne for several dealerships because its principal officer, Rudy Schoenecker, "had the reputation of being a fine dealer, conscientious, hard working, serious in purpose, [characteristics] we sought in all of our dealers." App. 770-71, 786.

During the 1970's, Westowne developed Naturalizer dealerships in shopping malls in Madison, Milwaukee, Appleton and LaCrosse. Brown had high regard for Schoenecker, App. 103-04, 108-09, 110, characterizing him

as "ha[ving] displayed a high level of discipline in the operation of his Naturalizer stores" and as "one of the best shoe men in the state." App. 166-67, 181, 236.

C. STATUS OF MARKET AS OF 1987.

Naturalizer dealers made Naturalizer the "Number One" name in women's footwear in brand recognition, reputation for quality, fit and comfort and brand loyalty. App. 104-05, 137-38, 249-50, 764, 767-70, 779-85. By 1987 their dealerships had become "one of the most sought after entities in the industry" and the network had grown to 621 stores. App. 194, 249. They played a major role in the women's footwear market because of their strategic mall locations and focus on a specific submarket: mature women, for whom comfort, fit and a good price/value relationship, rather than high fashion, were the dominant selling points. App. 120-21, 165, 770.

Brown had a duopoly in this market in Wisconsin with U.S. Shoe Corporation. App. 121-22, 168-69. In 1992, 15 of the 28 women's specialty shoe stores in Wisconsin were Brown-affiliated (10 were Naturalizer dealerships). The rest were affiliated with U.S. Shoe Corporation. App. 121-22.

As the Naturalizer dealerships flourished, a Brown affiliate, Wohl Shoe Company, began acquiring them. App. 115-16, 778. By June 1987 it had acquired about half of them. App. 915.

In the 1980's demand for casual and comfortable women's shoes increased. App. 773, 839-40. Satisfying this demand, where Naturalizer had the void, became increasingly critical. App. 429, 578-79, 589-91, 595-96, 949-50. Westowne found the SAS comfort casuals seldom had to be discounted and became "classics" that stayed in style, making them especially profitable. App. 115-17, 165-66. Though only 10% of Westowne's inventory, SAS produced over 20% of sales volume. App. 115-17, 165-66, 685. This was typical for dealers. App. 706-07, 751, 753, 1069-71.

Having a high quality comfort casual shoe also enhanced "multiple sales" -- a buyer of SAS comfort casuals could be sold Naturalizer dress shoes as well, or vice versa. App. 116-17, 166.

Brown knew the profits generated by the comfort casual shoes and the freedom to supplement the Naturalizer line to meet market demand were critical to the dealers' margins. App. 578-79, 591-92, 595-98, 795-96, 949-50.

D. BROWN'S PURITY POLICY.

In 1987 Brown adopted a so-called "purity policy" requiring that Naturalizer dealers sell Naturalizer shoes exclusively. By foreclosing competitors from its dealers, Brown expected to capture the dealers' sale of competing shoes (approximately 750,000 pairs annually), for a profit of $2.3 million on increased annual sales of $27,067,500. App. 251, 257, 260, 830-32, 900-01.

Brown had earlier rejected "purity," knowing the dealers' need to cover voids in the Naturalizer line. App. 804-05. But in 1987 Brown attempted to develop "knock-offs" of the three best-selling SAS comfort casual styles. App. 578-80, 618-19, 622-24, 828-30. The ability to mass-produce dress shoes proved not easily transferrable into mass-producing comfort casuals. App. 589-90, 772-73. Brown experimented with a new process (its "fitted upper" program)[2] to make the knock-offs. Brown's manufacturing people found the shoes failed quality control tests and didn't conform to samples Brown made up to show dealers. App. 833, 835, 849. Brown knew the mass-produced versions were no good, but "because we had so much invested in it dollar-wise we said no, we'll get by; let it roll." App. 611-12, 833-35.

Without disclosing its inability to mass-produce merchantable knock-offs, Brown showed the samples to Westowne and other dealers, together with price lists and catalogs describing the knock-offs as "classics" which were "available." App. 122-24, 148, 189, 288-95. Westowne ordered them for the upcoming season to "challenge" the SAS shoes in its stores. App. 123.

Then, on June 11, 1987, Brown sent a letter to all Naturalizer dealers stating that "significant capital investments have been made to maintain a strong domestic production resource augmented by import capabilities that enables [Brown] to maintain [its] competitive advantage on product, in-stock programs, delivery and so on" and that "recently there has been a focus on product development to insure that the Naturalizer line offers a complete and

balanced selection across all the major classifications of women's footwear." App. 101D-E (Emphasis supplied). The letter further states Brown "found it necessary to adopt a policy of carrying only Naturalizer footwear in stores identified as Naturalizer Specialty Stores" and that Brown expects "all stores will be in compliance with this policy on or before March 1, 1988." Brown official Enslin, who signed this letter, admits it required Naturalizer dealers to eliminate all non-Naturalizer shoes by the deadline or cease operating as a Naturalizer dealership. App. 653-54. Brown documents confirm this meant losing identification as a Naturalizer specialty store, loss of the exclusive territory and forfeiting all the other dealership benefits. App. 128, 320, 402, 404, 406-08, 892-94.

Enslin also admits "a complete and balanced selection [of Naturalizers] across all the major classifications" included comfort casual shoes, such as the SAS shoes, and that the letter represented Brown could meet dealers needs in that classification. App. 646, 648-49, 650-51, 652. This in fact was not true. App. 584, 843-49, 954. Brown realized comfort casuals were "desperately needed by our retailers." App. 581, 949-50.

When he first received Brown's June 11, 1987 purity letter, Westowne's Schoenecker was concerned about dropping the SAS line before actual market experience with the Naturalizer knock-offs. App. 124-25. But Brown representatives assured him Brown had produced Naturalizer quality "stitch-for-stitch" versions of the SAS shoes. App. 125-28, 686-87. They also repeated that if Westowne did not "go pure" Brown would terminate its dealerships.

App. 128. Westowne could operate multi-line stores and retail Naturalizer shoes but dealership benefits would be terminated and Brown could put Wohl-owned Naturalizer specialty stores in the same malls. App. 128, 320, 402, 892-94.

Had Westowne not been convinced by Brown it was safe to do so, it would not have agreed to purity or dropped SAS and would have pursued its legal remedies. App. 128-29. However, satisfied with Brown's direct assurances that the statements in the purity letter were true and that the promises made in it and the related communications would be kept, Westowne agreed to purity and dropped the SAS line. App. 129-31, 200.

E. BROWN'S FAILURE TO SUPPLY THE SAS KNOCK-OFFS.

Due to problems in Brown's "fitted upper" manufacturing process, the mass-produced Naturalizer knock-offs did not conform to the samples Brown had supplied to dealers but were ill-fitting and of substandard quality. App. 835. ("We were unable to deliver a product . . . that would fit to retail the same way we had sampled it to [dealers] and told them that it would fit.") The dealers found the Naturalizer comfort casuals to be "a disaster." App. 173, 725-26, 1036-37, 1049-50. Of the three SAS knock-off patterns promised by Brown (promoted as available "classics" in its dealer catalog, App. 288-95), Brown shipped only a few shoes in two patterns and none in the third. It soon dropped all three. App. 133-34, 587-88, 674-75, 873-74.

On September 18, 1987, Westowne wrote Brown it had eliminated SAS shoes but wasn't getting the Naturalizer replacements. Brown allowed an interim reinstatement of SAS but reaffirmed that thereafter Westowne could not violate "purity" without forfeiting its dealerships. App. 128. It also assured Westowne the comfort casual problems would be worked out, but that never occurred. App. 132-22, 584, 954.

On January 9, 1989, Westowne again wrote Brown that Naturalizer had not "lived up to its part of the bargain," that Westowne had lost sales of $177,000 from the absence of comfort casual shoes, and that the Naturalizer knock-offs "didn't fit and [were] dropped." App. 226. A memo of the Brown executive to whom this letter was referred concedes he "cannot contest [Westowne's] facts and statements." App. 224-28. Voluminous evidence confirms this: 59 Naturalizer dealers meeting in Las Vegas found Naturalizer knock-offs were "terrible." A California dealer found them "extremely bad... ill-fitting and more often than not, people who bought them wanted to return them." A general manager for 18 Naturalizer dealerships found "Brown couldn't deliver the shoes. They couldn't get them to [our] stores on time. In many cases they had a problem with their product. They didn't fit or they were manufactured wrong." App. 173, 725-26, 1036-37, 1049-50.

Brown dropped the knock-offs. The comfort casual classification remains a void and Brown acknowledges it has no plans to fill it. App. 132-33, 584, 954. Notwithstanding the dealers' "desperate need" for such shoes, Brown continues to insist on "purity," although it discriminatorily

allows some dealers to carry SAS or other outside lines and dealerships of Brown-affiliate Wohl needn't be "pure."[3] App. 136-37, 315-18, 324, 343-45, 349-50, 353, 361-62, 386-89, 546, 997-98. Brown continues to discipline [redacted] terminate dealerships attempting to reintroduce SAS or other comfort casual shoes. App. 314, 319, 320, 354-55, 402. It also has an aggressive program to acquire dealerships. App. 286-87, 608, 980-81.

Brown's purity program has cost SAS approximately 30% of its national market share in the comfort casual classification according to contemporaneous market statistics. R. 60, Vol. II Exhs. 94 at 148-49; App. 439, 443. SAS lost over $300,000 in 1988 sales in Wisconsin alone because it was effectively closed out of the malls in which Westowne did business. App. 168-70. It never recaptured the mall-based sales lost by being closed out of the Wisconsin Naturalizer dealerships. App. 169, 492-505. The supply of comfort casual shoes has gone down nationally because of Brown's "purity program." R. 60, Vol. II, Exh. 94 at 185.

F. DISRUPTION OF IN-STOCK INVENTORY SUPPORT FOR DEALERS.

According to the Naturalizer merchandizing manager, it was "critical" that Brown perform on its "commitment" to support the dealers with the centralized inventory it promised (the "in-stock" program) because "[Brown was saying] we would have these shoes and [the dealers] would be relying on being able to fill those in over the seasonal time periods" and "the stock program was a matter of 'very, very high critical importance.'" App. 841-42.

By January 1989 Westowne and the other dealers could not get reorders of the most popular Naturalizer dress shoes. When added to purity difficulties, this created a "gigantic" problem. App. 226, 599-603. A North Dakota dealer complained, "We went 'PURE' and we got late shoes, poor service and no stock in certain 'KEY SHOES.'" App. 284-85.

Brown's failure to fulfill its promise of in-stock inventory support was a major problem for the dealers. App. 367. *See also,* App. 302 (dealer losing 20% of business from lack of deliveries.) Brown's former merchandise manager testified to Brown's failure to provide the inventory in "key shoes." App. 601-03.

Discovery revealed why this happened. Brown-affiliate Wohl operated shoe departments in department stores in most of the same malls where the independents have Naturalizer dealerships, and acquired about half the dealerships as well. Brown allowed Wohl to preempt the supply of key Naturalizer shoes. Available inventory was "allocat[ed]" to "Wohl orders only." App. 853-57. Brown's Naturalizer Division manager says he was "directed" to ignore dealer needs in order to "take care of Wohl," and that Wohl's "huge reorders" would exhaust the inventory for several months each season. App. 601-03, 517-19. Wohl-operated shoe departments in department stores also obtained Naturalizers for 15% less than Westowne paid. App. 134-37, 386-87.

* * * * *

ARGUMENT

The district court violated fundamental summary judgment rules by making numerous findings of material fact in dispute, rejecting or disregarding evidence and resolving inferences for, rather than against, the movant.

> Although a fact finder might ultimately give more weight to the opinion [of one witness over another], to make that decision at the summary judgment stage usurps the role of the fact finder. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Wilson v. Williams, 997 F.2d 348, 350, (7th Cir. 1993); *Stewart v. RCA Corporation*, 790 F.2d 624, 628, (7th Cir. 1986). In analyzing the fact issues, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court consistently did the opposite. The district court's extraordinary departure from these rules requires reversal and remand of the case for trial.

STANDARD OF REVIEW

This court reviews *de novo* a district court's grant of summary judgment, drawing all reasonable inferences in

favor of the nonmoving party. *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1402 (7th Cir. 1996).

SUMMARY OF ARGUMENT

Westowne claims it had a continuing contractual relationship with Brown (namely, a dealership) and that Brown breached its duties under this contract to provide inventory support, to provide the comfort casual shoes specifically promised, to give Westowne access to the entire Naturalizer line, to exercise good faith in protecting the value of the Naturalizer trademark and to sell Westowne Shoes at a true wholesale price. The district court made several findings on disputed facts, including an erroneous finding there was no dealership and thus no underlying contractual relationship between the parties. On reconsideration, the district court acknowledged the dealership but found it irrelevant because this is not a suit seeking relief under the Wisconsin Fair Dealership Law, thus ignoring Westowne's common law right to sue for breach of contract that is preserved under the WFDL.

The district court erroneously made other findings of fact, based on which it summarily dismissed Westowne's promissory estoppel and misrepresentation claims. The court also attempted to rewrite Wisconsin antitrust law, violating the rule requiring a federal court to follow Wisconsin's declaration of its law. Under that rule and the applicable Wisconsin law, Westowne is entitled to a jury trial of its state antitrust claim.

I. A TRIAL IS REQUIRED ON WESTOWNE'S CLAIM FOR BREACH OF CONTRACT.

A. A Jury Could Find Westowne Had Dealership Agreements With Brown, Constituting a Continuing Contractual Relationship.

The district court erroneously found ". . . there simply is no evidence that a dealership or franchise[4] agreement was contemplated or agreed to by the parties" and felt Westowne had provided no "legal analysis" showing a dealership existed. Westowne then sought reconsideration, pointing out voluminous dealership evidence summarized in the earlier briefing, and that there was little "legal analysis" only because Brown had not challenged the existence of the dealerships.[5]

Westowne further pointed out that hundreds of independent Naturalizer dealers throughout the country would be astonished to learn they have no dealerships and that the business entity and relationship Brown so emphatically has assured them is uniquely valuable (*e.g.*, App. 249-50) is nonexistent. Brown officials in charge of Brown's program to acquire the dealerships from independents would be equally astonished. App. 286-87, 329, 778.

The district court's reconsideration decision appears to agree the Westowne stores were "dealerships," but holds that is irrelevant because Westowne is not seeking relief under the Wisconsin Fair Dealership Law ("WFDL"). App. 41. That misses the point. A dealership is a contractual relationship by definition. § 135.02(3), Wis. Stats. If a

dealership exists there must be a continuing contractual relationship. If a manufacturer/ franchisor breaches duties under that contract, the dealer's rights are not limited to WFDL remedies. The WFDL provides dealers with "rights and remedies in addition to those existing by contract or common law." § 135.025(2)(c), Wis. Stats.

There are three elements to a dealership (or franchise)[6] under Wisconsin law: (1) an agreement, (2) granting the right to sell or distribute goods or services, or to use a trade name, mark, advertising or commercial symbol, and (3) a community of interest in the business. § 135.02(3), Wis. Stats. *Ziegler Co., Inc. v. Rexnord, Inc.*, 139 Wis. 2d 593, 600, 407 N.W.2d 873 (1987); *Kania v. Airborne Freight Corp.*, 99 Wis. 2d 746, 763, 300 N.W.2d 63 (1981). Whether a dealership exists is ordinarily a question of fact for the jury. *Ziegler*, 139 Wis. 2d at 611-12.

1. A jury could find a contract (agreement) existed between Brown and Westowne for the Naturalizer Specialty Stores.

The agreement creating a dealership may be "either expressed or implied, . . . oral or written. . . ." § 135.02(3), Wis. Stats.; *Van v. Mobil Oil Corp.*, 515 F.Supp 487, 491 (E.D. Wis. 1981). The existence and terms of the contract are questions of fact. *Ziegler*, 139 Wis. 2d at 593; *Household Utilities, Inc. v. Andrews Co.*, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1975); *Dreazy v. North Shore Publishing Co.*, 53 Wis. 2d 38, 44-45, 191 N.W.2d 720 (1971).

The testimony of Lemp, the Brown official who developed the Naturalizer dealership network, is unquestionably competent evidence of the agreement, *supra* at 3-4. *See, e.g., Dreazy,* 53 Wis. 2d at 44; *Household Utilities,* 71 Wis. 2d at 28-29; *ABC Outdoor Advertising, Inc. v. Dolhun's Marine, Inc.*, 38 Wis. 2d 457, 460-61, 157 N.W.2d 680 (1967); *Lien v. Pitts*, 46 Wis. 2d 35, 43, 174 N.W.2d 462 (1970).

The written terms of the agreement (*e.g.* documents authorizing dealers to operate the stores under the Naturalizer trade name and trademark and display the Naturalizer sign) constitute part but not all of the relationship between the parties. *E.g.*, App. 101-101C, 239-45 (some using the words "agree" and "agreements"). *E.g.*, App. 101-101A, 241-45. The last document cited identifies plaintiff Biwer as an "authorized dealer."

The district court engaged in impermissible fact finding in disparaging Schoenecker's affidavit as "only Schoenecker's statements" and elsewhere rejecting his testimony altogether. App. 9, 11. One who negotiated or agreed to a contract on behalf of a party can testify to the contract. *Dreazy, Household Utilities, ABC Outdoor Advertising, Lien.* Even where the parties differ as to the existence or terms of a contract, these cases hold the testimony of each is admissible and the matter is for the jury. Here, the officials for both sides (Lemp and Schoenecker) agree on the existence and terms of the contract as set forth at 3-4 above. *Compare*, Lemp, App. 774-801 and Schoenecker, App. 103-08.

The principals on both sides testify an agreement was made. Such documentation as exists is self-characterizing as an "agreement." The existence of an "expressed or implied" agreement that is "oral or written" is clearly supported in the plaintiffs' evidence. Even if Brown had supplied evidence to the contrary (it didn't), the issue would be for the jury.

2. *A jury could find that by this agreement, Westowne was granted the right to sell or distribute Naturalizer goods and services and use the Naturalizer trade name, trademark and advertising.*

This second element is undisputed. It is established by all three of the ways listed in the statute. *Ziegler*, 139 Wis. 2d at 600; *Kania*, 99 Wis. 2d at 763.

3. *A jury could find Brown and Westowne had a community of interest in the business of offering, selling and distributing Naturalizer goods and services by their agreement.*

The third element, "community of interest," also exists beyond reasonable dispute. Wisconsin law once held the "community of interest" element required proof that the business devote 50% to 60% of its time to the grantor's product. *Foerster, Inc. v. Atlas Metal Products Co.*, 105 Wis. 2d 17, 27, 313 N.W.2d 60 (1981). Westowne's stores qualified even under that rule, having 90% of their inventory in Naturalizer and 10% in SAS, and after purity, 100% in Naturalizer. This was typical of dealers. App. 174-75, 706-07, 1067, 1081-83. *Ziegler*, 139 Wis. 2d at 600-12, adopted a more flexible test, making existence of a "dealership" a

jury issue even if the retailer devotes less time and resources to the grantor's products (there, 1% to 8% of total sales, with 32% to 95% of one sale category). *Id.*, 139 Wis. 2d at 597-98, 602, 611-12.

Under *Ziegler* a "community of interest" exists upon proof of (1) a "continuing financial interest" and (2) "interdependence," *i.e.*, shared goals and a cooperative effort more significant than in the typical vendor-vendee relationship. *Ziegler*, 139 Wis. 2d at 604-05; *Guderjohn v. Loewen-America, Inc.*, 179 Wis. 2d 201, 205, 507 N.W.2d 115 (1992). These are established here in the three main aspects of the business: inventory, advertising and personnel.

Westowne's 90% (later, 100%) Naturalizer inventory alone establishes the parties' shared continuing financial interest and interdependence in the sale of Naturalizer shoes. Moreover, there was a joint inventory system here (Naturalizer's "in-stock" program), which allowed dealers to offer a wide variety of patterns, colors and sizes, and go beyond mere product-selling to provide fashion counseling, special orders, repairs and similar activities.

The parties also were interdependent in their joint advertising expenditures to promote the Naturalizer trade name. App. 137, 557, 643-45, 779-84, 865.

As to personnel, Brown created an "Independent Retailers Division," specially trained to support the specialty store dealers. App. 107-09, 247, 782, 793. On the dealers'

side, managers and salespersons devoted 90% (later, 100%) of their time to selling Naturalizer shoes.

The parties' intent to engage in a long-term enterprise is also an important factor under *Ziegler,* 139 Wis. 2d at 606. Here, the projections for each store contemplated a continuing association, as did the long-term leases negotiated with mall owners jointly by Brown and the dealers. App. 108, 181-88, 233-38, 239-45, 247.

Another indicator is that a dealership can normally demonstrate "a stake in the relationship large enough to make the grantor's power to terminate . . . a threat to the [dealer's] economic health." *Ziegler* at 605. When Naturalizer dealers convert to a multi-line store in order to carry SAS or other comfort casuals they suffer an immediate drastic loss of business. App. 175-78, 731, 745-49, 1041-43, 1077. This is also documented in Brown's efforts to enforce purity since 1987, disciplining those its own documents call "dealers" who circumvent purity or defy Brown's threats to save their Naturalizer identity but remain viable by carrying SAS or other outside lines. App. 310-11, 319, 320, 324-25, 339, 351, 354-56, 358-60, 385, 392-93, 402, 404-08. Other Brown documents refer to "dealers": App. 319, 336. For example, the "Naturalizer Specialty Store dealers" listed by Brown (App. 319) were to be "addressed" regarding purity precisely because either "choice" -- go pure or forfeit your dealership -- represents serious economic detriment. The author of the June 1987 purity letter himself confirmed the community of interest between Brown and its Naturalizer specialty store dealers

when he thus characterized the relationship: "Collectively we see it as one." App. 643-45.

4. Conclusion.

The district court was misled by a raw assertion in Brown's summary judgment reply brief that the parties' relationship was "strictly" one of "vendor-vendee." R. 66 at 10. The record shows a dealership and at least presents a jury question. The existence of a dealership (1) establishes the continuing contractual relationship underlying the breach of contract claim and (2) establishes that Westowne's stores were entitled to WFDL protection, which affects reliance issues addressed later under promissory estoppel and misrepresentation.

B. A Jury Could Find the Dealership Contracts Were Amended to Incorporate the "Purity" Requirement and Brown's Promise to Provide Merchantable Comfort Casual Shoes.

Westowne's Schoenecker testified the communications between him and Brown in 1987 modified the dealership agreement to provide that (a) the dealerships would drop outside lines and (b) Brown would provide a merchantable comfort casual shoe it had developed and was then able to supply to fill the comfort casual void earlier existing in the Naturalizer line. App. 122-29, 221-23, 189-200. It was clear error to reject Schoenecker's testimony out of hand, App. 9, 11, especially since the "agreement" is confirmed by Brown officials (alone establishing Brown's intent to be bound) and by other independent dealers.

Lemp, Jr., testified Brown intended to require dealers "to purchase only [Naturalizer]" and thus "to amend the [dealership] agreement," App. 824-26, and that Brown had told the dealers (and gave them samples indicating) the knock-offs would fit; "promised" the dealers these shoes would fill the void; and that "In conjunction with the purity letter . . . we were telling the dealers that we would have product that would fill their needs; therefore, they no longer needed to buy outside lines[.]" App. 835, 875, 878. Pearce, Brown's top spokesperson, testified to the "agreement with the stores to carry exclusively the Naturalizer, NaturalSport labels." App. 984. A Brown memo says "we have required our dealers to sign purity agreements. . . ." App. 361. Brown criticized dealers who "elected to break their agreement with Brown Shoe Co. and add outside lines to . . . support the casual end of their presentation." App. 1024.

An owner of 18 midwest dealerships testified to his "agreement" with Brown, both before and after purity, App. 1081-82, as did dealer Green of North Dakota. App. 280, 733. *See also* App. 356 (New Jersey dealer describing "our agreement" to stock only Naturalizer) and App. 395-96 (representative of 59 dealers complaining of threats from Brown's legal department "for violation of the purity agreement.") This is all competent testimony. *Dreazy,* 53, Wis. 2d at 44; *Household Utilities*, 71 Wis. 2d at 28-29; *ABC Outdoor Advertising,* 38 Wis. 2d at 460-61; *Lien*, 46 Wis. 2d at 43.

What Brown promised to supply to the dealers was described with precision ("stitch for stitch" knock-offs of the SAS patterns), shown to them in sample form, and identified

in catalogs and price lists as "available." A warranty that the shoes are merchantable, fit for ordinary use and comparable to the samples is implied in every sale. § 402.314, Wis. Stats. Westowne had every right to expect from Brown merchantable comfort casual shoes -- a Naturalizer-quality knock-off of the three SAS patterns.

The district court accepted Brown's strawman argument that Westowne was asserting an unenforceable "promise" the shoes would be "successful" or "profitable." App. 8-9, 11. That was not Brown's promise, nor was the agreement indefinite: the dealers promised to go pure; Brown promised to provide merchantable shoes in the comfort casual classification, which it identified specifically as "stitch-for-stitch" knockoffs of three SAS shoes. These terms "spell out the essential commitments and the obligations of each party with reasonable certainty." *Witt v. Realist, Inc.*, 18 Wis. 2d 282, 118 N.W.2d 85, 93 (1962).

Moreover, "modification of a contract may be written, oral, or partially written and partially oral," and whether there was a meeting of the minds on the modification's terms can be shown by "the language used and the conduct of the parties." Wis. JI-Civil 3030; *Gutknecht v. C.A. Lawton Co.*, 231 Wis. 413, 285 N.W.411 (1939) and *ABC Outdoor Advertising,* 38 Wis. 2d at 457. Meeting of the minds "must necessarily be derived from a consideration of [the parties'] words, written and oral, and their actions." *Household Utilities,* 71 Wis. 2d at 29; *Hanz Trucking v. Harris Brothers Co.*, 29 Wis. 2d 254, 260-261, 138 N.W. 2d 238 (1965).

The district court's misunderstanding is further reflected in its finding "the language concerning Brown's 'focus on product development to insure that the Naturalizer line offers a complete and balanced selection' is in no way connected to the 'purity policy'." App. 10. It was exactly this assurance (that Brown had filled its recognized void), with its promise to supply the shoes, confirmed by Brown orally and by product literature, that induced Westowne to go pure.

It is unclear what the district court intends by first saying Westowne had an "option" or "choice" ("even if not an economically attractive one") to go pure or remove the Naturalizer sign, then to say the June 1987 purity letter "does not constitute a 'contract'" and provides "no hint that plaintiffs have any choice in the decision," followed by the comment that the plaintiffs did have a choice, followed by a comment that the June 1987 letter "was, <u>if anything</u> (sic), a modification of the conditions under which the plaintiffs could use the Brown-owned trademarks." App. 4-5, 10-11.

As discussed in this brief's next section, Westowne had several choices. But that is not really the question here.

The breach of contract claim rests not on what agreements the parties might have made but on the agreement they <u>did</u> make. Neither Brown nor the district court can rewrite history. Westowne <u>agreed</u> to the deal and performed by remaining a Naturalizer dealer and dropping SAS. Brown's side of this agreement was to add merchantable comfort casual shoes to the Naturalizer line.

The district court's misunderstanding is further shown in the finding that Schoenecker's September 18, 1987 letter was "equally 'non-contractual.'" App. 10. Schoenecker testified he told Brown Westowne would go pure and in fact it did go pure after Brown convinced Schoenecker it could and would supply Naturalizer-quality replacement shoes. The September 1987 letter confirms Westowne's agreement to go pure and that it had performed. Moreover, Brown's attempt to supply the SAS knock-offs and insistence on "purity" and Westowne's dropping SAS are all acts confirming the agreement. Plainly, there is at least a jury issue on whether the parties intended to be bound, as "derived from a consideration of their words, written and oral, and their actions." *Skycom Corporation v. Telstar Corporation*, 813 F.2d 810, 814 (7th Cir. 1987), *Household Utilities, Inc.*, 71 Wis. 2d at 17.

Finally, the district court overlooked that only one of Brown's five breaches of the dealership agreement relates to the purity/SAS dispute. Four are based on other Brown duties under the dealership agreement. *See* next section.

In conclusion, voluminous evidence supports a jury finding there was a dealership agreement, as modified in June 1987 to incorporate the "purity" requirement and Brown's obligation to provide shoes in the comfort casual classification.

C. There is Evidence Brown Breached the Dealership Agreement.

"[E]very contract implies good faith and fair dealing between the parties." Wis. JI-Civil 3044; *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 793, 541 N.W. 2d 293 (Ct. App. 1995). Breach of this implied duty supports a contract action separate from the breach of specific terms. *Foseid*, 197 Wis. 2d at 794-96. Technical performance is not enough; a contracting party is entitled to fair and good faith performance. *Foseid*, 197 Wis. 2d at 796-97, citing Wis. JI-Civil 3044 and RESTATEMENT (SECOND) OF CONTRACTS § 205. In that legal setting, it was clear error for the district court to deny a trial to Westowne on at least five breaches by Brown of the dealership agreement.

1. Failure to Supply Merchantable Comfort Casual Shoes.

It is undisputed all three SAS knock-offs, represented to Naturalizer dealers as classic, carry-over patterns (App. 288-95) were soon dropped. The few that were shipped were late. One pattern was "so bad" it was cancelled halfway through the first season. App. 133-34, 226-27, 674-75, 587-88, 873-74. "[Brown] knew [it] did not fit. [The Brown testers] couldn't get it on their foot." App. 849. Brown was fully aware of problems in "quality, workmanship [and] fit," and as of June 11, 1987 Brown had not achieved the ability to mass produce a Naturalizer-quality SAS knock-off, and never did so. App. 176, 582, 587-88, 611-12, 625-26B, 627-29, 665, 835, 837-38, 847-49, 951-52. They also explained why: their skill in making dress shoes

did not carry over into making comfort casuals and their new "fitted upper" manufacturing process did not work. App. 833-37, 584-89.

Brown admits, "We should have said, you know what? It doesn't matter that we've spent $200,000 on this. The shoes aren't right; we better do it right. But because we had so much invested in it dollar-wise, we said, no, we'll get by; let it roll." App. 611-12. Because Brown did not supply the promised shoes, many dealers across the country defied "purity" and reinstated SAS to survive, resulting in Brown's policing efforts. App. 310-11, 314-19, 324, 339, 351, 354-56, 358-60, 735-37.

2. *Failure to Provide Inventory.*

Apart from purity, Brown's failure to provide "in-stock" inventory support on the most popular Naturalizer patterns seriously damaged dealers, including Westowne. App. 367: Brown acknowledges "In-stock is by far [the dealers'] biggest concern;" App. 343: Brown indicates "lack of sizes in key stock shoes has hurt [dealers'] ability to replenish carry-over merchandise. . . ;" App. 345: Brown recognizes dealers' concerns that "based on Naturalizer's poor in-stock Program and key shoes and new product being promoted at off-price, they can't afford to meet competitor's prices and stay in business." See also, Schoenecker letter to Enslin of 1/9/89, App. 226-27.

It was not "good faith and fair dealing" for Brown to permit its Wohl Division to preempt inventory, as shown in evidence overlooked by the district court: App. 517-19, 599-

603, 680-82, 714, 725-26, 800-01, 841-42, 854-58, 959, 1018-19, 1036-37, 1039, 1042.

* * * * *

II. WESTOWNE IS ENTITLED TO A TRIAL ON ITS CLAIM UNDER PROMISSORY ESTOPPEL.

The district court correctly said:

> In order to prevail on their promissory estoppel claim, plaintiffs must show that: (1) a promise was made that the promisor should have expected would induce action or forbearance of a definite and substantial character; (2) the promise did induce the required action or forbearance; and (3) injustice can be avoided only by enforcing the promise.

App. 12; *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 695-96, 698, 133 N.W.2d 267 (1965); *see also*, *Skycom Corp.*, 813 F.2d at 817.

A. Statements, Writings and Actions Constituting the Promise.

In early 1987 Naturalizer's sales representative told Westowne Brown "had successfully achieved making a 'stitch-for-stitch' knock-off of the SAS comfort casual shoes" and showed it the samples. App. 122-23. He acknowledged the importance of such shoes and said

Naturalizer could fill Westowne's orders and reorders of the knock-offs as effectively as SAS had. *Id.* He gave Westowne Naturalizer's March 24, 1987 catalog-price list depicting the knock-offs and representing they were available for delivery in time for fall 1987 sale in a wide variety of colors. App. 25 and 189, 190, 192; App. 123. Westowne ordered some to "challenge" the SAS shoes--expecting to offer customers a choice between SAS and the Naturalizer version. App. 123.

Westowne next received Brown's June 11, 1987 purity letter. It speaks of Naturalizer's "high standard of quality and fit," Brown's "significant capital investments" to augment product, in-stock programs and delivery, and "a [recent] focus on product development to insure that the Naturalizer line offers a complete and balanced selection across all the major classifications of women's footwear." The letter then states Brown "had adopted a policy under which Naturalizer stores would be allowed by Brown to carry only Naturalizer shoes and that Schoenecker would be expected to be in compliance with this policy on or before March 1, 1988." App. 123-24, 194-95.

The author of Brown's letter admits it was sent to all independent Naturalizer dealers, and that in saying Naturalizer offered "a complete and balanced selection across all the major classifications," he intended to include comfort casual shoes and to tell the dealers Brown was then in a position to deliver the shoes and to support the dealer sales of them through the in-stock inventory program. Enslin Dep. at 72, 91-92, App. 643, 650-51. He also admits he intended to tell the dealers the comfort casual shoes would

meet Naturalizer's high standard of quality and fit. App. 646.

A week later Brown's sales representative gave Westowne Naturalizer's latest catalog-price list dated June 11, 1987, the date of the purity letter, again depicting the Naturalizer comfort casual shoes as available in a wide variety of colors and sizes. He repeated his assurances that Naturalizer had duplicated the corresponding SAS patterns "stitch-for-stitch," that they were excellent shoes and that Naturalizer could support them with a strong in-stock and delivery program so that Westowne need have no concerns about agreeing to "purity" by eliminating SAS. App. 126-27, 196-99. Westowne's Schoenecker also had several telephone discussions with Brown home-office officials, who gave him the same assurances and convinced him that with the Naturalizer-quality replacements, Westowne could safely agree to drop SAS in accordance with Enslin's purity letter. App. 127-28. Brown acknowledges it had follow-up discussions with dealers regarding purity. App. 975.

In addition to the catalog-price lists, Brown sent Westowne an inventory planning document showing Naturalizer comfort casuals as "classic" styles to be "carried over" from season to season and available in all sizes, with a merchandise code indicating a "52-week shelf life." App. 289, 291-95.

The merchandise manager in charge of developing the Naturalizer knock-offs expressly characterizes the above communications as a "promise." Lemp, Jr., p. 100. ("...we

had promised [the dealers] that [the Naturalizer knock-off] was the answer and it clearly was not.")

Schoenecker was typical of dealers in understanding these communications to be a promise. Thus, Roe, general manager for 18 dealerships, testifies repeatedly to Brown's "promises and assurances" to provide Naturalizer "quality versions of the comfort casual shoes," based on which his stores went pure. App. 1036-37, 1040-41. *See also* Green, App. 710, 713.

The district court found Brown's statements were merely "expressions of hope as to future financial success" of the knock-offs and that there is no evidence Brown "promised" their "success." On this erroneous analysis the court held there was insufficient "manifestation of intent by the promisor to be bound" under *Major Mat Co. v. Monsanto Co.*, 969 F.2d 579, 583 (7th Cir. 1992). This "manifestation" "must necessarily be derived from a consideration of the [promisors'] words, written and oral, and their actions." *Skycom,* 813 F.2d at 814.

In *Major Mat Co.* the court found insufficient Monsanto's statement it had "an unending supply" of remnants the plaintiff wanted to buy. 969 F.2d at 581. Unlike the alleged promise in *Major Mat Co.*, Brown's promise to supply a merchantable comfort casual shoe is not a "mere prediction," expression of hope or vague assurance to meet an unspecified future need, but rather a definite promise to meet the expressed and acknowledged demand for a comfort casual shoe. On point here is *Janke A.E. Const. Co., Inc. v. Vulcan Materials Co.*, 527 F.2d 772, 780 (7th

Cir. 1976), where the defendant supplier told the plaintiff contractor it would supply pipe that would "do the job." *Janke* found the evidence established "[The defendant] promised to supply [the plaintiff] with pipe which would be acceptable to the project engineers, and that [the plaintiff] acted in justifiable reliance upon such promise." *Id.* at 780. Further, under *Hoffman*, 26 Wis. 2d at 698, the issue is for the jury.

B. Reliance.

Westowne had five choices:

1. Go "pure" by dropping SAS, as Brown wanted. Westowne chose this, in reliance on Brown's statements it could, and its promises it would, supply a merchantable Naturalizer knock-off of the SAS shoes.

2. Forfeit the Naturalizer dealership ("take the sign down"), converting to a multi-line store. Dealers knew if they did this they would suffer dramatic economic harm and those who chose it did. *See, e.g.*, Traub, Wiss, Roe and Green at App. 177-78, 745-49, 1041-45, 1077; Brown documents of dealer resistance at App. 310-11, 314-319, 320, 324, 339, 351, 354-56, 358-60, 402, 735-37. Enslin acknowledged the importance to

the dealers of the sign and the status of specialty store ownership. App. 644-45.

3. Sue Brown to obtain relief under the WFDL. § 135.03, Wis. Stats. Westowne forwent this and other legal recourse, which constitutes reliance on Brown's assurances and promises it could and would provide the Naturalizer-quality SAS knock-offs. *Lundin v. Shimanski*, 124 Wis. 2d 175, 186, fn.6, 368 N.W.2d 676 (1985).

4. Refuse to change and take its chances as to how Brown would react. Some dealers who thus resisted Brown have been terminated or otherwise disciplined and some have been allowed to carry SAS or other outside lines.

5. Go out of business.

The pitfalls of fact finding on summary judgment are shown in the district court's mistaken chronology, which supposedly "undermined" Westowne's case that it was induced to go pure by Brown's promise to supply the SAS knock-offs. App. 13-14.

First, Westowne's decision to order the Naturalizer knock-offs "to challenge" the SAS shoes was not the reliance. The reliance comes after the purity letter, and indeed after Westowne received further assurances from Brown, confirming its ability to supply the Naturalizer knock-offs, when Westowne decided to go pure by dropping SAS. It indisputably did this, as confirmed in Schoenecker's September 18, 1987 letter, App. 200.

Second, plaintiffs did argue and did present evidence that the shoes ultimately delivered (to the extent any were delivered) were unmerchantable and ill-fitting which could not have been appreciated when Westowne was shown the samples and read the descriptive literature and the oral representations. As mass-produced, such shoes as Brown did ship did not fit and were of such poor quality they could not be sold. App. 226, 580-592, 611-612, 680, 725-26, 835-39, 951-52, 1036-37.

Third, the district court's finding[7] as to Schoenecker's state of mind (that dropping SAS was only "a measure of how badly plaintiff wanted to keep the Naturalizer sign over their stores") is more impermissible fact-finding. It is flatly contradicted by Schoenecker's testimony as to his state of mind, by Westowne's contemporaneous correspondence with Brown, App. 200, 226-27, and by the testimony of the author of the purity letter (Enslin) who, after the letter, orally assured Westowne that Brown could indeed supply the shoes: "[Schoenecker] made the decision, based on my letter, to drop the shoes." App. 664 (emphasis supplied). He also confirmed Westowne ultimately found the Naturalizer knock-offs were not an

adequate replacement for the SAS shoes. *Id.* *See also* store manager Golemgeske's understanding that Westowne's decision to eliminate SAS shoes was based on Brown's assurances that a quality, "stitch-for-stitch" "knock-off" of SAS shoes would be available and could be reordered on a consistent basis. App. 687. That is the same kind of reliance on Brown's promise given by dealers throughout the country. *E.g.*, App. 708, 713, 1036-37, 1060.

Finally, the district court held (without a trial) that equity should not rescue Westowne because it "could have, but chose not to, remove the [Naturalizer] sign and reintroduce the more successful SAS shoes." App. 14. It violates any notion of equity that Westowne is foreclosed from relief because it did not forfeit its dealership! "Taking the sign down" was recognized as a "catastrophic" choice which would cause "tremendous losses in volume" and even "end their business." App. 177-78, 731, 748-49, 1041, 1044, 1077. When a dealer "takes the sign down" it forfeits "vital" dealer benefits. *See*, App. 43, 313, 891-93 (Brown memo listing Naturalizer specialty stores that converted to multi-line stores and are to be "purged from the list of stores receiving specialty store only mailings") and Brown can open a Naturalizer specialty store in the former dealer's same mall. *E.g.*, App. 402.

Proposing either to go pure or "take the sign down" is no more reasonable an "option" than the highwayman's proposal: Your money or your life. Taking the sign down means forfeiture of what Brown itself calls "one of the most sought after entities in the industry" -- Naturalizer dealerships, which Schoenecker spent his life developing and

promoting. It is unjust to require Schoenecker to forfeit them as a condition to relief, and especially to so hold even without a trial.

There is credible evidence from which a jury could find Brown made promises designed to induce commercially reasonable detrimental reliance that should be "enforced . . . to compensate the relying party for his injury in relying." *Skycom*, 813 F.2d at 817.

III. THE RECORD REQUIRES A TRIAL ON THE MISREPRESENTATION CLAIM.

This claim is based on misrepresented facts, omissions and actionable opinions.

"[S]tatements of opinion are actionable if the speaker knows of facts incompatible with his opinion." *Lundin,* 124 Wis. 2d at 175; *Zingale v. Mills Novelty Co.*, 244 Wis. 144, 150-51, 11 N.W.2d 644 (1943) (an opinion in a "business transaction" on facts not disclosed implies there are no incompatible facts known).

Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 627 (7th Cir. 1993), cited by the district court, did not involve representations inconsistent with undisclosed facts and specifically distinguished claims, like those here, involving misleading responses or representations between parties in a special relationship. It also cites *Dresser Industries, Inc. v. Gradall Co.*, 702 F. Supp. 726, 736 (E.D. Wis. 1988), *aff'd*, 965 F.2d 1442 (1992), closely analogous to the instant case, in which a manufacturer represented its

engines "were defect free, fit for ordinary purposes for which such engines are sold and used, and fit for use in [the customer's] product." The court found the manufacturer had a duty to disclose engine problems which it knew: "a proper misrepresentation claim can be maintained by [the customer] on the basis of a misrepresentation of the present design of an engine of which [the customer] was contemplating purchase." Statements about the present capability or quality of an existing product, if untrue, are actionable misrepresentations. *E.g., D'Huyvetter v. A.O. Smith Harvestore*, 164 Wis. 2d 306, 321, 475 N.W.2d 587 (1991). Even "silence" is actionable "if there is a duty to speak" because "information is asked for" or "the circumstances would call for a response in order that the parties may be on equal footing or where there is a relationship of trust or confidence between the parties. Wis. JI-Civil 2403; *Dresser Industries*.

Also analogous is *Associated Randall Bank v. Griffin, Kubik*, 3 F.3d 208, 209 (7th Cir. 1993), (investment broker liable for representation that municipal bonds (which turned out to be "junk bonds") were "not unlike" bonds the buyer had purchased earlier). "[A] statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support his opinion" can be determined to be a "representation of fact" and the jury is to consider "the disparity of knowledge between the parties of the underlying facts." Wis. JI-Civil 2403. *See also*, *Neas v. Siemens*, 10 Wis. 2d 47, 102 N.W.2d 259 (1960), (representation that cows were "good milk cows" is actionable), holding that "if there were any doubt whether the representation was a statement of fact or opinion, the

question would be for the jury." *Neas*, 10 Wis. 2d at 58, 59.

Brown repeatedly represented through many channels that it had "successfully 'knocked-off' the SAS comfort casual shoes," that these were then "available," that Brown "could provide in-stock support" and "delivery" of them, so that "there was no further need for [Westowne] to carry SAS shoes as an outside line." App. 91-92, 122-23, 126-27, 189-90, 192-93.

The district court incorrectly found "the only thing Schoenecker didn't know, and neither did Brown, was whether the Naturalizer models would replace the profitability of the SAS models." App. 18. To the contrary, Brown official Brimer testified that in developing the SAS "knock-offs" Brown "discovered . . . problems . . . from quality, workmanship and fit," that on June 11, 1987 Brown was aware of problems with quality and fit that "we should have said . . . the shoes aren't right; we better do it right. But because we had so much invested in it dollar-wise, we said, no, we'll get by; let it roll." (App. 582, 587-88,611-12). Lempe, Jr., testified, "we had continuous fit and quality problems" and "were unable to deliver a product . . . that would fit to retail the same way we had sampled it to [dealers] and told them that it would fit," that top management knew of the production problems which caused "heated exchanges" between Brown's marketing and manufacturing divisions, that testers could not get the slip-on version on their feet, and he specifically identified several statements in Enslin's purity letter that were not true at the time made. App. 835, 837-38, 842-43, 847-49.

Production manager DeGrande testified Brown test reports showed "the shoe wasn't fitting" causing "concerns" about the shoes in this series, that because of "the test fitting" problems at least one of three SAS knock-offs was dropped and attempting a companion series "was a nightmare [he] wouldn't want to live through again" because of problems "throughout that entire program" (App. 625-29). Naturalizer Division Manager Nizinski, testified "there were definitely problems" Brown experienced in its effort to achieve the SAS "knock-offs" which involved "the sourcing of the uppers and the manufacturing of the footwear to get it to fit" and that these problems were never solved (App. 951-52).

Further, a jury could infer Brown already knew what the dealers later learned when the production versions of the shoes were shipped: that they were "terrible," "a disaster," "extremely bad," "ill-fitting," "didn't fit" and "were manufactured wrong." App. 173, 226, 725-26, 1036-37, 1049-50. Dispositive also is the substantially undisputed testimony that Brown never did develop the ability to produce a merchantable comfort casual -- so its representation in June 1987 that they had done so could not have been true. App. 584, 844, 954. It is also undisputed that neither Schoenecker nor any of the other dealers knew of any of these manufacturing problems. App. 129, 202, 213-15, 217-23.

Compounding the district court's error was its inappropriate application of the rule under which a party cannot create an issue of fact "by submitting an affidavit containing conclusory allegations which contradict plain

admissions in prior depositions . . . ." *Diliberti v. United States*, 817 F.2d 1259, 1263 (7th Cir. 1987). App. 45. At issue was one question out of Schoenecker's multi-volume deposition, where he testified that "as of June 11, 1987" he did not believe Naturalizer had shoes in all major classifications of women's footwear. App. 203-04. Later in his deposition, Schoenecker testified he did believe the statement. App. 217-18. He then explained in his deposition that he did believe the statement in sofar as it referred to availability of comfort casual shoes, and went on to explain that he was "concerned" at the time because of the cruciality of comfort casual shoes to his business. App. 218-21. Enslin and other Brown officials then reassured Schoenecker that they had the quality knock-off; thus convinced, Schoenecker proceeded to notify the sales representative that Westowne was "going to eliminate SAS's and go pure." App. 221. This is essentially what Schoenecker says in his affidavit. App. 123-31. This was not "unequivocal deposition testimony" which a later affidavit "directly contradicts," and is thus not subject to the *Diliberti* rule. Literally, a "complete" selection across "all" major classifications would include athletic and other styles Schoenecker knew were not in the Naturalizer line. He did believe what Enslin was intending to convey -- that Naturalizer had filled its void in comfort casuals. Schoenecker's own deposition clarifies and explains the testimony, so the rule does not apply. *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893, 895 (5th Cir. 1980) (reversing summary judgment), cited with approval in *Babrocky v. Jewel Food Co.* 773 F.2d 857, 861 (7th Cir. 1985).

More importantly, the issue of reliance here is controlled not by what Schoenecker believed "as of June 11, 1987," but by what he believed when he acted in reliance -- *i.e.*, when Westowne dropped SAS after the repeated oral and written assurances described above, whereby Brown convinced Schoenecker that the June letter was accurate, that it had the Naturalizer knock-offs and that Westowne could safely drop SAS shoes, as ultimately reported in Schoenecker's September 18, 1987 letter. App. 200.

Finally, the district court totally overlooks the testimony of Brown official Enslin, that after his June 11, 1987 letter he conferred with Schoenecker, and that "[Schoenecker] made the decision, based on my letter to drop the [SAS] shoes. App. 664 (emphasis supplied). *See also,* Westowne store manager Golemgeske testimony that Westowne dropped SAS in reliance on Brown's assurances of a quality, "stitch-for-stitch" knock-off being supplied by Naturalizer. App. 687.

The remaining elements of the misrepresentation claim (negligence and strict liability) are not at issue here.[8] A trial is required.

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WESTOWNE SHOES, INC., and
CARL A. BIWER COMPANY,
Petitioners-Plaintiffs-Appellants,
vs. Appeal No. 96-1955
BROWN GROUP, INC., BROWN SHOE COMPANY, BROWN GROUP RETAIL, INC., BROWN GROUP INTERNATIONAL, INC., FAMOUS FOOTWEAR COMPANY and WOHL SHOE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
Case No. 93 C 720,
The Honorable Rudolph T. Randa, Presiding

PETITION FOR REHEARING

(Tables omitted)

Westowne Shows, Inc., and Carl A. Biwer Company (collectively, "Westowne"), plaintiffs-appellants, petition that their appeal be reheard pursuant to Fed. R. App. P. 40 and Circuit Rule 40 on the grounds there are points of law and fact which the court has overlooked and misapprehended within the meaning of Fed. R. App. P. 40 as more particularly stated below.

POINTS OF LAW AND FACT APPARENTLY OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. The court misapprehended that the contract breach claimed by Westowne was imposition of the "purity" program, and thus reasoned Westowne was making an untimely claim under the Wisconsin Fair Dealership Law ("WFDL"). In fact, the claim pleaded and consistently argued by Westowne was a common law contract claim based on the parties' terminable but continuing dealership agreement under which Brown would supply shoes and Westowne would sell them as a Naturalizer dealer, which Brown breached both by failing to supply certain shoes specifically promised in consideration for purity (the SAS "knock-offs") and by failing to provide certain standard patterns Brown had promised to have regularly available in its "in-stock" inventory program.

2. The court overlooked the important point of law that even if the dealership agreement was terminable at will by either party, the parties could assume mutual

obligations (such as providing merchantable SAS substitutes in exchange for Westowne's agreement to eliminate SAS shoes) to be performed while the dealership agreement was in effect, and those mutual obligations were enforceable.

3. The court overlooked and did not address the fact that it was pleaded, argued and testified to by the principal spokespersons for both contracting parties, that as an important part of the dealership agreement Brown promised to maintain an "in-stock" program to timely replenish the inventory of Westowne as a Naturalizer dealer, but Brown breached this element of the agreement by diverting supply to its own retail outlets therefore failing to fill Westowne's orders as promised.

4. The court overlooked and did not address the fact that it was alleged, argued and the principal spokespersons for the contracting parties both testified that as part of the dealership agreement, Westowne was to have access to the entire Naturalizer line, but Brown breached this element of the agreement and provided its own (Wohl) retail outlets with desirable Naturalizer styles and patterns not made available to Westowne and the other independent dealers.

5. The court misapprehended that Westowne did not really rely on Brown's promise to provide an SAS substitute because it would have "gone pure" even if Brown had not promised a Naturalizer-version substitute, overlooking the fact that Westowne pleaded and argued and its principal spokesperson and other witnesses testified that Westowne would <u>not</u> have gone pure and eliminated SAS

shoes in the absence of Brown's promises and assurances it had developed and would supply merchantable Naturalizer versions of SAS shoes.

6. The court misapprehended that Westowne's claim of misrepresentation fails because "Westowne itself asserts it would have gone pure to retain its dealership, regardless of any representations concerning the SAS knock-offs," overlooking the fact that Westowne pleaded, argued and its chief spokesperson testified that if Brown's problems and inability to produce and provide SAS knock-offs had been disclosed, Westowne would not have gone pure.

ARGUMENT

IV. THE COURT MISAPPREHENDED WESTOWNE'S BREACH OF CONTRACT CLAIM.

The central premise of the court's decision is:

> Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of losing its Naturalizer dealership (that is, the right to represent its stores as Naturalizer dealers) or replacing the SAS shoes that it carried with inferior knock-offs.

Decision at 3. That is not and never was Westowne's argument.[1]

Instead, Westowne argues Brown committed a breach by failing to provide specific patterns of shoes it promised to provide under its continuing contractual relationship with Westowne -- namely, a merchantable Naturalizer version of the SAS patterns (the "SAS knock-offs"), as well as the principal Naturalizer patterns (identified in dealer catalogs as "in-stock" shoes) which Brown promised it would provide on an immediate-reorder basis to Westowne and the other dealers under Brown's "in-stock" inventory program. While this is not a suit to enforce WFDL rights, the provision in that Act, under which a dealership assumes a contractual relationship between grantor and grantee, is relevant to the analysis that there was a continuing contractual relationship between the parties. § 135.02(3), *Wis. Stats.*

Other contractual provisions breached by Brown are discussed below. **None** of them involves the theory that Brown "committed a breach" by putting to Westowne the choice to go pure or abandon its Naturalizer dealership status.

The court's misapprehension of the case is confirmed by another sentence in the same paragraph as that quoted above:

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[1] *See*, Westowne's district court briefs at R. 61 at 43-47 and R. 126 at 27-33; Main Appeal Br. at 16-31 and Reply Br. at 7-13.

> Westowne's argument is that the course of dealing between the parties, not any written contract, gave a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose unreasonable conditions on the retention of the dealership, such as requiring the dealer to carry a substandard product.

Id. at 3. Again, Westowne never argued this. The court mistakenly saw this case as a claim for wrongful termination (or wrongful change in competitive circumstances), and thereupon concluded it is really a WFDL claim, couched in breach of contract terms, and thus an "evasion" of WFDL's one-year statute of limitations. *Id.* at 3.

Not true. Westowne's breach of contract claim is emphatically not for wrongful termination or change in competitive circumstances, nor for being forced to go pure, or for being put to some miserable choice (go pure or take your Naturalizer sign down).

Rather, Westowne's breach of contract claim arises from the deal Westowne **did** make with Brown. Brown's principal spokesperson (Lemp, Sr.) and Westowne's principal spokesperson (Schoenecker) both testified to the principal terms of the original agreement which established their continuing contractual relationship (a dealership agreement), under which Brown promised to provide an "in-stock" inventory system supplying Westowne with Naturalizer shoes and Westowne agreed to carry Naturalizer as its principal line; Brown licensed Westowne to use the Naturalizer name

and sign and provided Westowne with typical dealer support services. Originally, the parties agreed Westowne could carry outside lines to supplement the Naturalizer line, but by mutual promises the agreement was amended in 1987 when Westowne agreed to drop SAS (and any other outside lines) and Brown promised to provide a merchantable Naturalizer "knock-off" of the SAS shoes to fill the void. That was a contract and it was breached.

Thus, the breach of contract case can be summarized as follows:

I. For each of its dealerships, Westowne had a continuing contractual relationship (a dealership agreement) with Brown under which Brown had certain specific contractual obligations (*e.g.*, to supply the SAS knock-offs, and to provide the in-stock inventory support on the principal Naturalizer shoes); Westowne was obligated under this agreement (from and after 1988) to sell Naturalizers exclusively.

II. Brown breached the agreement by:

(a) Failing to provide the SAS knock-offs as promised (it provided a few unmerchantable shoes in one of the three patterns and none in the other two patterns promised);

(b) Failing to provide in-stock inventory support for the principal Naturalizer patterns, designated in dealer catalogs as "in-stock" shoes (Brown had the shoes but diverted them to its own retail outlets, leaving Westowne and other independents with unfilled orders);

(c) Other breaches of the deal (*e.g.*, debasing the Naturalizer name licensed as part of the dealership agreement, failure to provide access to the entire Naturalizer line).

III. Westowne was damaged by these breaches.

Thus the breach of contract claim is not about termination, or choices Westowne had when Brown instituted purity. Westowne agreed to purity, just as Brown agreed to supply merchantable knock-offs to replace the SAS shoes Westowne dropped. Westowne performed by discontinuing the SAS line; Brown did not perform: it failed to produce and supply a merchantable comfort casual shoe, and then abandoned its attempts to do so leaving Westowne and other dealers without an essential component of their inventory. App. 87-89, 91-93; Main Br. at 6-11, 22-28; Reply Br. at 10-11.

The court's statement, "What is critical is the absence of terms" (Decision at 4), indicates the court overlooked the Lemp/ Schoenecker testimony establishing those terms, the parties' course of dealing confirming them and the modification of their earlier agreement by the institution of purity together with Brown's promise to supply knock-offs filling the void. At the time of that modification, Brown's promise was specific as to subject matter and time. Taken together, Brown's June 11, 1987 "purity letter," its Naturalizer price lists and dealer buying guide (App. 194-95, 189-90, 192-93, 196-99, 288-95), the oral agreements and promises between the parties (App. 122-31) and Westowne's written acceptance of the purity proposal and accompanying promise to complete the elimination of SAS shoes from its inventory by the stated deadline (App. 200), show a simple and specific agreement that in no way calls upon the court "to write the parties' contract for them." (Decision at 4). This evidence and permissible inferences from it, particularly on summary judgment, show that in June 1987 Brown told Westowne that if it wished to remain a Naturalizer dealer, it must eliminate its SAS inventory by March 1, 1988. This was accompanied by contemporaneous written and oral assurances that Westowne could safely do this because Brown had developed Naturalizer quality stitch-for-stitch SAS "knock-offs" of three specific shoe patterns, which would be available for early spring 1988 delivery (App. 196, 199) as a product to be carried over from year to year supported by an in-stock program (App. 289-95, 148), and that Westowne accepted Brown's offer, in writing, specifically accepting the purity proposal and promising all its SAS shoes would be eliminated by the March 1, 1988 deadline, on the understanding the SAS patterns would be

replaced by Naturalizer's knock-offs of the SAS comfort casuals. The record shows Westowne performed on its promise; Brown did not. Westowne eliminated all its SAS shoes. Brown did not produce a merchantable SAS substitute and abandoned its effort to do so. Thus, the record shows a specific agreement and a breach.

The concerns expressed by the court (at 4) about when the contract started, when and how does it terminate, whether "purity" is a violation, if Brown relinquished the right to dictate dealer inventory, what consideration did it receive -- further evidence the court misapprehended Westowne's primary breach of contract claim as the WFDL claim Westowne could have brought earlier had it been given an informed choice to do so.

Westowne has always acknowledged that the written portion of the dealership agreement provided either party could terminate the dealership relationship at will. (App. 239). Whether or not that termination right is enforceable in Wisconsin (in view of the WFDL) is not at issue here -- this is not a claim for wrongful termination and the agreement (dealership relationship) was not terminated. It was modified, by agreement. The right to modify is not at issue either; Westowne agreed to the modification and performed accordingly. Brown did not perform; it breached.

Wisconsin law and other decisions of this court are clear that even a relationship terminable at will can be contractual, and that where the parties make mutual promises in the course of their dealings, the nonperforming party is liable for breach of contract. For example, *McNight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990),

involved a claim of wrongful termination of an employment at will. Speaking for the court and citing other authorities, Justice Posner wrote:

> Employment is not a state of nature but a *continuing contractual relation*. Wages, benefits, duties, working conditions, and all (but one) of the other terms are specified and *a breach of any them will give the employee a cause of action for breach of contract*. . . . All that is missing is a provision that gives the contract a fixed term or that entitles one or both parties to a specified amount of notice before the other party can cancel the contract without liability. A contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a day -- or a minute -- long.

McNight, 908 F.2d at 109. (Emphasis supplied).

Similarly, in *Reimer v. Badger Wholesale Co., Inc.*, 147 Wis. 2d 389, 433 N.W.2d 592 (Ct. App. 1988), the plaintiff was defendant's employee-at-will. Much like Brown promised to supply Westowne with merchantable substitutes so that it would not suffer losses from eliminating SAS shoes, the defendant in *Reimer* promised its employee it would make one of his sales territories exclusive so that he could expand his sales and income. The defendant did not perform on this promise and discharged the plaintiff. The defendant contended that since the plaintiff could be terminated at will, it was not liable for failing to give him an

exclusive territory. Applying Wisconsin law, the court held the at-will relationship of the parties did not relieve the defendant from liability for breaches of a promise prior to plaintiff's termination so that the defendant's failure to perform on the promise presented a "legitimate breach of contract case." *Reimer*, 147 Wis. 2d at 392-94, 433 N.W.2d at 593-94.

As with the other breach of contract claims referred to below, the existence and terms of a contract are questions of fact for the jury. *Household Utilities, Inc. v. Andrews Co.*, 71, Wis. 2d 17, 29, 236 N.W.2d 663 (1975); *Dreazy v. North Shore Publishing Co.*, 53 Wis. 2d 38, 44-45, 191 N.W.2d 720 (1971).

V. THE COURT DID NOT ADDRESS BROWN'S BREACH OF ITS AGREEMENT TO TIMELY REPLENISH WESTOWNE'S NATURALIZER INVENTORY THROUGH BROWN'S "IN-STOCK" PROGRAM.

While the court (at 3) discusses the compounding of Westowne's problems caused by allocating available supplies of Naturalizer shoes to its own retail outlets rather than filling Westowne's reorders from the "in-stock" program, it does not address the question of whether this was another breach of contract, although this breach was also argued in this appeal. Main Br. at 11-12, 27-28; Reply Br. at 11-12. Perhaps the court overlooked this breach because it was not addressed by the district court either. Both courts overlooked the evidence that as part of the dealership agreement, Brown was to support Westowne's operation as

a Naturalizer Specialty store with its "in-stock" program to make it economically feasible for Westowne, like other dealerships, to carry a broad range of inventory in different patterns, sizes and colors, so that as popular patterns were sold Westowne's inventory could be readily replenished on reorder. App. 105, 107-08, 799-801, 791-92.

The testimony of the executives for **both sides** to the dealership agreement is competent evidence that Brown was contractually bound to provide this in-stock support to Westowne. *Dreazy,*, 53 Wis. 2d at 44-45; *Household Utilities,* 71 Wis. 2d at 29-29; *ABC Outdoor Advertising Inc. v. Dolhun's Marine, Inc.*, 38 Wis. 2d 457, 460-61, 157 N.W.2d 680 (1967); *Lien v. Pitts*, 46 Wis. 2d 35, 43, 174 N.W.2d 462 (1970). Brown's failure to supply inventory through in-stock support to Westowne and its deliberate allocation of available inventory to its own stores is evidence of a breach warranting trial.

VI. THE COURT OVERLOOKED WESTOWNE'S CLAIM FOR BROWN'S BREACH OF ITS AGREEMENT THAT WESTOWNE WOULD HAVE ACCESS TO THE COMPLETE NATURALIZER LINE.

This claim was also overlooked by this court and the district court, even though it was pleaded and argued on this appeal. App. 89-90; Main Br. at 30-31. The court overlooked evidence that as part of the dealership agreement, Westowne was to have access to the entire Naturalizer line so that it could respond to customer requests for any Naturalizer patterns advertised. App. 105-06; 791-92. The

court also overlooked the facts showing Brown breached this part of the agreement by providing its company-owned Wohl stores with large quantities of shoes that were not made available to Westowne and other independents. App. 858-59.

VII. THE COURT REJECTED WESTOWNE'S PROMISSORY ESTOPPEL AND MISREPRESENTATION CLAIMS ON THE MISTAKEN BELIEF WESTOWNE WOULD HAVE GONE "PURE" EVEN IN THE ABSENCE OF THE PROMISES AND MISREPRESENTATIONS ALLEGED.

In its decision (at 5), the court refers to Westowne's alternative argument for promissory estoppel that it relied on Brown's promises by going "pure" and states:

> Yet at the same time it argues that it had to go pure because it could not afford to give up the Naturalizer sign. This means that it would have gone pure even if Brown had not promised a perfect substitute. So the promise made no difference.

The court goes on to say:

> The promise is also the basis for Westowne's claim of misrepresentation, and fails for the same reason. Fraud is not actionable without harm. If, as Westowne itself asserts, it would have gone pure to retain its dealership,

> regardless of any representation concerning the SAS knock-offs, those representations caused it no harm.

Westowne does **not** claim it would have eliminated SAS shoes and gone pure even if it had known Brown would breach its promise to provide a merchantable comfort casual shoe or had Brown disclosed the fact it was not able to produce a merchantable comfort casual and planned to drop the Grenada, Utah and Russet series of SAS substitutes. In fact, the opposite is true. The court overlooked critical evidence, including the averment of Westowne's president that:

> Had I remained concerned about Naturalizer's ability to supply us with a quality comfort casual shoe to substitute for the SAS, or had I believed some of the independent dealers would be allowed to continue carrying outside lines while still retaining their dealership and others not, I would **not** have agreed to purity and would have consulted an attorney to pursue legal remedies as were available to me.

App. 129 (Emphasis supplied) (Main Br. at 29). Because Westowne was satisfied with Brown's direct assurances, both orally and in writing, that Brown could and would provide Westowne with merchantable SAS substitutes, Westowne agreed to purity and dropped the SAS line. App. 129-31.

The court may have misapprehended Westowne's argument (Main Br. at 37-38) reviewing the evidence

showing that removing the sign and forfeiting the dealership was not an acceptable option, as meaning Westowne would have gone pure under any circumstances, including the inability to sell comfort casual shoes. This does not follow and is directly contrary to the evidence in the record on what Westowne would have done had Brown disclosed its inability to provide comfort casual shoes and its decision to abandon further efforts to do so.

By promising Westowne it would provide merchantable SAS substitutes so that it could safely eliminate the SAS line, by misrepresenting its ability to produce and supply these shoes and by failing to disclose its problems in producing them, Brown prevented Westowne from making an **informed** choice from among the choices listed on pages 35 and 36 of Westowne's main brief. Had Westowne's president been correctly informed and not misled, and had he consulted counsel to explore his options and remedies as he avers he would have done, given the evidence of the importance to his profitability of being able to both carry merchantable comfort casual shoes and operating as a Naturalizer dealership, a jury could well infer Westowne, on the advice of counsel, would have (1) continued to operate as a Naturalizer Specialty store carrying SAS comfort casuals to supplement the Naturalizer line, as many other dealers did (App. 314-19[2]) and forced Brown to sue to remove the sign which it may or may not have elected to do; or (2) sued to

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[2] This portion of the appendix contains several lists of numerous Naturalizer dealers who resisted purity, kept their outside lines and continued as Naturalizer Specialty stores even three years following imposition of the purity program.

seek legal or equitable relief under the Wisconsin Fair Dealership Act or other available remedy.

Westowne respectfully submits the court's rejection in this summary judgment appeal of its claims for promissory estoppel and misrepresentation, based on the incorrect determination Westowne would have gone pure even in the absence of Brown's promises and misrepresentations, constitutes an impermissible finding of fact denying Westowne a jury trial on relevant issues of fact, in violation of Westowne's rights under the Seventh Amendment.

CONCLUSION

The record in this case discloses Schoenecker of Westowne was a loyal and valuable dealer who took Brown at its word. A compelling case is also made that Brown's broken promises and misrepresentations substantially contributed to Westowne's fatal losses.[3] Where these facts could be found, remedies should be sought, not avoided, and Wisconsin law that urges "the courts to keep remedies abreast of increased moral consciousness of honesty and fair

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[3] While Westowne's evidence shows the losses it attributes to Brown's conduct ultimately forced Westowne out of business, this action was brought while Westowne was still an active dealership, not after it "went under" as the court appears to believe. Decision at 3. The record demonstrates that until "purity," which prevented Westowne from meeting customer demand for comfort casual shoes, Westowne was profitable and consistently current on its account with Brown. App. 114-15, 226-28.

representations in all business dealings"[4] should be honored. Thus, the court is urged to reconsider its decision and to permit a trial on the breach of contract, promissory estoppel and misrepresentation claims.

Respectfully submitted,

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[4] *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 695, 133 N.W.2d 265 (1965).

Supreme Court, U.S.
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No. 97-68

In The

Supreme Court of the United States

October Term, 1996

WESTOWNE SHOES, INC.
AND CARL A. BIWER CO.,

Petitioners,

v.

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY AND BROWN GROUP INTERNATIONAL, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals denied the Petitioners their "right to appeal" because it did not address in its written opinion every issue raised by the Petitioners in the precise manner or depth that the Petitioners had desired.

2. Whether the court of appeals was obligated to relieve the Petitioners of the consequences of failing to demonstrate the existence of a genuine issue of material fact in support of their claims by reversing the district court's entry of summary judgment.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, by their undersigned counsel, respectfully request that this Court deny the petition for the writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review in this case.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN THIS CASE

Fed. R. Civ. P. 1:

> Rule 1. Scope and Purpose of Rules
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 56(c):

> Rule 56. Summary Judgment
>
> . . .
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

. . . .

Sup. Ct. R. 10:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be,

settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

COUNTERSTATEMENT OF THE CASE[1]

This case is singularly unfit for review by the United States Supreme Court. The case concerns nothing more than the propriety of the entry of summary judgment, in a diversity action raising only state law claims, where the nonmoving party has failed to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The Respondents adopt and incorporate as the relevant facts those facts and determinations set forth in the decisions and orders of the district court (App. C at 14-57 and App. D at 58-64) and the opinion of the court of appeals (App. A at 1-11). The Respondents object to any characterization of the facts by the Petitioners that is inconsistent with the facts and determinations set forth in those decisions and orders and opinion.

The Petitioners filed a lengthy complaint in Waukesha County (Wisconsin) Circuit Court asserting a host

[1] Throughout this brief, reference to the Appendix submitted by the Petitioners with their Petition for a Writ of Certiorari will be made as "App. ___ at ___." Throughout this brief, reference to the Petition for a Writ of Certiorari filed in this case by the Petitioners will be made as "Pet. at ___."

of claims, mostly state law breach of contract claims, against the Respondents. The Respondents removed the case to the United States District Court for the Eastern District of Wisconsin and answered the complaint, also asserting state law counterclaims against the Petitioners. All of the substantive issues presented in the case involved Wisconsin law. Discovery established that the Petitioners' claims were baseless and the Respondents filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In a thoughtful and careful decision and order, the district court reviewed the Petitioners' claims and the evidentiary record, and noted the absence of any genuine issue of material fact as to any claim asserted by the Petitioners. The Respondents' motion for summary judgment was granted, and judgment was entered dismissing the complaint.[2] The Petitioners appealed to the United States Court of Appeals for the Seventh Circuit.

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[2] Based on a review of the undisputed facts, applying Wisconsin law, the district court found that each of the Petitioners' claims was without merit. The district court determined that the asserted "contracts" had not been demonstrated to have existed. The district court also determined that the Petitioners' conduct "was a business decision unrelated to anything that [the Respondents] might have promised," and accordingly dismissed the promissory estoppel claim in the absence of proof of an inducing promise. App. C at 27. The district court dismissed the negligent misrepresentation and strict responsibility misrepresentation claims because the Respondents had no legal duty to disclose information to the Petitioners and because the alleged misrepresentations were not of present or pre-existing fact. App. C at 34.

On appeal, the Petitioners chose to recast their basic arguments to emphasize the Wisconsin Fair Dealership Law (though no claim could be asserted thereunder due to the passing of the statute of limitations). In their principal and reply briefs, the Petitioners pursued a variety of issues relating to virtually all of their claims, notwithstanding the deficiency of the factual record.

The court of appeals, in a well-reasoned opinion, affirmed the district court's judgment dismissing the complaint. *See Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994 (7th Cir. 1997) (Posner, C.J.); App. A at 1-11. Writing for a unanimous panel of the court of appeals, Chief Judge Posner specifically noted that the Petitioners had pursued a "blunderbuss full of charges, mostly based on the common law of contracts but with trademark and antitrust allegations thrown in. . . . " *Westowne Shoes*, 104 F.3d at 995; App. A at 1-2. Chief Judge Posner's characteristically efficient opinion focused primarily on certain basic issues that exemplified the meritless claims. For example, it was pointed out that the Petitioners failed to demonstrate with sufficient evidence the *existence* of the "contracts" alleged to have been violated or their reliance on any statements made by the Respondents. In addressing the other pertinent issues (i.e., promissory estoppel and misrepresentation), the court of appeals agreed with the district court's determination that no reasonable jury could find for the Petitioners because the alleged promises and representations by the Respondents neither induced the Petitioners to take any action nor caused the Petitioners any harm. As the court of appeals observed,

"the promise made no difference": "No harm, no tort." *Westowne Shoes*, 104 F.3d at 997; App. A at 6-7.

The Petitioners have filed a petition for a writ of certiorari from this adverse determination.

REASONS FOR DENYING THE WRIT

I. THIS CASE CONTAINS NO IMPORTANT OR COMPELLING QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

This case presents no substantive questions of federal law. The Petitioners' complaint raised a host of claims arising solely under Wisconsin law. In a thoughtful opinion, the district court entered summary judgment on all the Petitioners' state law claims. On appeal, the court of appeals considered the Petitioners' "blunderbuss of charges," and in an efficient and well-reasoned opinion affirmed the dismissal of the Petitioners' claims. Neither the district court nor the court of appeals has decided any issue of substantive federal law in this case, much less an "important" or "compelling" one, as required by Supreme Court Rule 10.

In an attempt to conjure a federal question that may somehow appear worthy of Supreme Court review, the Petitioners contend that they have been denied the "right of appeal" because the court of appeals "failed to address a major issue presented for review." *See* Pet. at 21. Specifically, the Petitioners assert that the court of appeals failed to consider their various breach of contract claims. *See* Pet. at 17-21. This assertion is incorrect. Indeed, in

pursuing this case, the Petitioners apparently confuse the right to *an* appeal with a right to *win* on appeal. They have had their appeal, they have lost it, and examination of their "right of appeal" argument shows that it borders on frivolity.

Though the Petitioners may be unhappy with the outcome, review of the pleadings clearly demonstrates that the Petitioners have been fully accorded their right of appeal. *See* 28 U.S.C. § 1291; Fed. R. App. P. 3. Following the district court's decision dismissing their claims on summary judgment (App. C at 14-57) and their unsuccessful subsequent motion for reconsideration by the district court (App. D at 58-64), the Petitioners gave notice of their appeal. In regular and due course, the appeal was fully briefed and argued.[3] After consideration of the issues on appeal, the court of appeals, by Chief Judge Posner, in an opinion evidencing his characteristic efficiency and clear reasoning, unanimously affirmed the entry of summary judgment against the Petitioners. *See Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994 (7th Cir. 1997); App. A at 1-11.

Unhappy with this result, in an attempt to obtain a *second* bite at the appellate apple, the Petitioners then filed a petition for rehearing. App. L at 168-185. As the Petitioners admit, this petition explicitly articulated (among other issues) their belief that the Court had misunderstood the Petitioners' contract law claims. Pet. at 21; App. L at 169-79. The court of appeals considered these contentions but was

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[3] In connection with the appeal, the Petitioners filed a principal brief (App. K at 125-167) and a reply brief. The court of appeals also held oral argument on the appeal. App. B at 12-13.

not moved. After considering the petition, the court of appeals denied the request for a rehearing.

The Petitioners evidently think that this Court offers them a *third* bite at the apple. They are, of course, mistaken. Discretionary review in the Supreme Court is limited primarily to cases that present conflict among the federal courts of appeals or involve important issues or compelling questions of federal law. *See* Sup. Ct. R. 10. Those criteria are not satisfied by this case, notwithstanding the Petitioners' creative arguments.

Though the Petitioners' argument is that they have been denied their "right of appeal," the reality is simply that they had their appeal and lost. The record shows that the Petitioners failed to convince the court of appeals of the merit of their full appeal. Indeed, the Petitioners' *actual* complaint relates to the court of appeals' *manner* of addressing their breach of contract claims in its written opinion. This does not, as the Petitioners believe (Pet. at 16-21), equate with a denial of their right of appeal, and the Petitioners cite no valid authority in support of their creative proposition.[4]

The Respondents wish to make it clear – the Petitioners' asserted breach of contract theories were in conflict wit the evidentiary record. Nevertheless, the district

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[4] Petitioners' "authority," two cases decided by this Court forty years ago, is substantively irrelevant to the "right of appeal" argument made in this case. Neither *Blackburn v. Alabama*, 354 U.S. 393 (1957), nor *Barr v. Matteo*, 355 U.S. 171 (1957), has anything to do with the right of appeal or a petitioner's "right" to have an appellate court address every claim made on appeal.

court carefully considered these theories. Having considered all the claims, the district court determined that the *existence* of the contracts allegedly violated by the Respondents had not been established with the definiteness required under Wisconsin law. App. C at 20-25. *See also Witt v. Realist,* 118 N.W.2d 85, 93 (Wis. 1962).

On appeal, the court of appeals readily acknowledged the variety and nature of the Petitioners' claims, and explicitly observed the Petitioners' "blunderbuss" approach to the appeal.[5] The court of appeals also explicitly addressed the Petitioners' contract law claims in its opinion and found them deficient. In its consideration of these claims, the court of appeals articulated in simple and straightforward terms the very fundamental problem in the Petitioners' "breach of contract" arguments (already exposed in the district court):

> The absence of a *written* contract other than the irrelevant licensing agreement and the multitudinous sales contracts, also irrelevant, covering particular shipments of shoes to [the Petitioners'] stores is not critical to the common law contract claim. . . . What is critical is the absence of terms. [The Petitioners'] principal testified that he had a contract with [the Respondents], but he was unable to answer such questions as, When did the contract start? When or under what conditions does it terminate? Is the "purity" program a violation? Did [the Respondents] so far relinquish [their] rights

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[5] *Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994, 995 (7th Cir. 1997); App. A at 1-2.

> over [their] trademark as to entitle [the Petitioners] to sell another manufacturer's shoes from a store that holds itself out to be a Naturalizer dealership? What consideration did [the Respondents] receive for this trademark-endangering concession? The common law of contracts does not empower a court to write the parties' contract for them, *Witt v. Realist, Inc.*, 18 Wis. 2d 282, 118 N.W.2d 85, 93-94 (1962); *Messner Manor Associates v. Wisconsin Housing & Economic Development Authority*, 204 Wis.2d 492, 555 N.W.2d 156, 159 (App. 1996); *Goldstick v. ICM Realty*, 788 F.2d 456, 461-62 (7th Cir. 1986), but that is what [the Petitioners are] asking us to do.

Westowne Shoes, 104 F.3d at 996; App. A at 4-5 (emphasis in original). There being no evidence of the terms of *any* of the asserted "contracts," the breach of contract claims were properly found to be without merit as a matter of Wisconsin law.

Even if the court of appeals did not specifically discuss in detail each one of the Petitioners' alleged breaches of contract in its written opinion, the Petitioners certainly cannot complain that the court of appeals failed to consider the underlying issues. The Petitioners' failure under Wisconsin law to establish on the record the existence of the terms of one or more "contracts" related to *all* contract claims, including any claim of a supposed modification of such "contracts."

In any event, no rule of law obligates a court of appeals to provide litigants with a complete chronicle of its considerations and analysis. Nor can the Petitioners force the court of appeals to write an opinion that is

perfected to their liking. Appellate courts are not "performing bear[s]" that must "dance to each and every tune played on an appeal." *See State v. Waste Management of Wisconsin, Inc.*, 261 N.W.2d 147, 151 (Wis.), *cert. denied*, 439 U.S. 865 (1978); *Mainiero v. Jordan*, 105 F.3d 361, 364-65 (7th Cir. 1997) (Coffey, J.). *See also Kairys v. Immigration and Naturalization Service*, 981 F.2d 937, 940 (7th Cir. 1992) (Posner, J.) ("[p]rocedural fairness does not require an appellate court to discuss every issue raised by an appellant, let alone every word or act that might cast doubt on one piece of evidence"). It is a salutary and routine practice for a reviewing court to discuss only the principal dispositive arguments of the appeal, even though all issues receive consideration.[6] *See, e.g., Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1022 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991). To force the courts of appeals to do otherwise would put them at the mercy of appellate litigants and their often prolix briefs.

Because the court of appeals did not deny the Petitioners their right of appeal, and because this case presents no important question of federal law, this case does not warrant review by this Court.

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[6] Even if the Petitioners could show that the court of appeals neglected to consider a legal issue, the Petitioners do not even suggest that such consideration would have changed the outcome of this case.

II. THIS CASE DOES NOT REFLECT A DEPARTURE EITHER FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS OR THIS COURT'S PRECEDENT ON SUMMARY JUDGMENT.

The principles and standards governing summary judgment under Rule 56 are well-settled in light of this Court's 1986 trilogy of cases. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The standards are clear: Rule 56(c) mandates the entry of summary judgment where "there is no genuine issue as to any material fact and [where] the moving party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 322 (citing Fed. R. Civ. P. 56(c)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. A fact is material if, under the applicable substantive law, it "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248. A "genuine" issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. To survive a proper motion for summary judgment, the nonmoving party

"must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industries*, 475 U.S. at 586.[7]

Existing summary judgment procedures, articulated by this Court, explicitly and implicitly recognize that factually and legally insufficient cases should be removed from the busy trial calendars of the federal district courts.[8] As a result of this Court's clear standards, the practical utility – indeed, the necessity – of summary judgment is unquestionable.[9] "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

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[7] The "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," although if the evidence "is merely colorable" or "is not significantly probative," then the summary judgment is proper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[8] "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . . " *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

[9] "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Celotex*, 477 U.S. at 327.

The federal courts, heeding this Court's pronouncements, faithfully apply Rule 56 and use summary judgment as a useful tool to clear from crowded dockets those cases that are factually insubstantial. *See, e.g., Oates v. Discovery Zone*, 116 F.3d 1161, 1175 (7th Cir. 1997) (Rule 56 is "a tool of great utility in removing factually insubstantial cases from crowded dockets"); *United States ex rel. Anderson v. Northern Telcom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995) (the summary judgment rule is the "principal tool" by which "factually insufficient claims or defenses [can] be isolated and prevented from going to trial"); *Stella v. Town of Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993) ("proper province" of summary judgment is "to weed out claims that do not warrant trial"); *United National Insurance Co. v. Tunnel, Inc.*, 988 F.2d 351, 355 (2d Cir. 1993) ("Summary judgment is a tool to winnow out from the trial calendar those cases whose facts predestine them to result in a directed verdict."); *Smith v. Marcantonio*, 910 F.2d 500, 502-03 (8th Cir. 1990) ("Summary judgment is designed to remove factually unsubstantial cases . . . from crowded district court dockets.").

There can be no question that, under the clear guidance provided by this Court, the courts of appeals vigilantly police the judgments of the district courts to ensure that Rule 56 is administered properly and fairly. That was done here. The court of appeals examined the rationale of the district court's entry of summary judgment and found it to be both consistent with the record and proper under Wisconsin law. Had Rule 56 been improperly applied by the district court, the court of appeals would have reversed the district court's judgment of dismissal. It cannot be said that any of the courts

of appeals do not hesitate to reverse district courts that have improperly entered summary judgment.[10]

The Petitioners ignore all of this and ask this Court to give them special treatment and extraordinary review. In arguing that the court of appeals failed to follow the summary judgment procedures by improperly finding

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[10] *See, e.g., Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538 (1st Cir. 1997) (entry of summary judgment affirmed in part, reversed and vacated in part and remanded); *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996) (entry of summary judgment affirmed in part, reversed in part, and remanded); *Varrallo v. Hammond Inc.*, 94 F.3d 842 (3d Cir. 1996) (entry of summary judgment affirmed in part, and reversed and remanded in part); *Amirmokri v. Baltimore Gas and Electric Co.*, 60 F.3d 1126 (4th Cir. 1995) (entry of summary judgment affirmed in part, reversed in part, and remanded); *Gaspard v. Offshore Crane and Equipment, Inc.*, 106 F.3d 1232 (5th Cir. 1997) (entry of summary judgment reversed and remanded); *Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc.*, 96 F.3d 174 (6th Cir. 1996) (entry of summary judgment reversed); *Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224 (7th Cir. 1996) (entry of summary judgment reversed and remanded); *Lhotka v. United States*, 114 F.3d 751 (8th Cir. 1997) (entry of summary judgment reversed and remanded); *Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582 (9th Cir. 1996) (entry of summary judgment affirmed in part, reversed in part and remanded); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996) (entry of summary judgment affirmed in part, reversed and remanded for further proceedings in part); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996) (entry of summary judgment reversed and remanded); *Continental Casualty Co. v. Hartford Fire Insurance Co.*, 116 F.3d 932 (D.C. Cir. 1997) (entry of summary judgment reversed and remanded); *Seal-Flex, Inc. v. Athletic Track and Court Construction*, 98 F.3d 1318 (Fed. Cir. 1996) (entry of summary judgment reversed and remanded).

facts against them (Pet. at 21-28), the Petitioners apparently confuse the pronouncement of a legal conclusion (*i.e.*, the absence of evidence sufficient to create a genuine issue of material fact) with factfinding. Review of the record shows that in affirming the district court's judgment, the court of appeals was merely reviewing the record that had been made and stating a legal conclusion based upon the undisputed facts and evidence in the record. After resolving all factual disputes in the Petitioners' favor (App. A at 2), the court of appeals agreed with the district court that a reasonable jury could not find in the Petitioners' favor on the promissory estoppel and misrepresentation claims because the alleged promises and misrepresentations neither induced the Petitioners to act nor caused the Petitioners harm. Reaching these legal conclusions does not constitute "impermissible factfinding."[11]

The court of appeals had a job to do: apply this Court's well-settled and clear standards. It did the job. It examined the record, "resolve[d] the factual disputes as favorably to [the Petitioners] as the record permit[ted]" (App. A at 2), and, like the district court before it, determined that no reasonable jury could find in the Petitioners' favor. *See Westowne Shoes,* 104 F.3d at 996-97; App. A at 6-7, 11. Having done so, the court of appeals complied with the mandate of Rule 56 and properly affirmed the district court's entry of summary judgment

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[11] Even if the court of appeals did "find facts" against the Petitioners, it is not the function of this Court to correct factual errors or misapplication of properly stated rules of law. *See* Sup. Ct. R. 10.

in the absence of a genuine issue of material fact on the Petitioners' claims. *See* Fed. R. Civ. P. 56(c). Nothing in or about the court of appeals' opinion suggests that it so far departed from the usual course of judicial proceedings or from this Court's established standards governing summary judgment under rule 56 as would justify this Court exercising its supervisory powers. *See* Sup. Ct. R. 10.

Viewed in the context of the thousands of other cases decided upon summary judgment, this case is wholly unexceptional. It is just one case in a long line of cases reflecting the proper application of the summary judgment procedures – entry of summary judgment against a party who fails to produce evidence sufficient to create a genuine issue of material fact.

Because the court of appeals properly applied this court's clear standards governing summary judgment under Rule 56 in its review of the district court's decision, there is no reason for this Court to exercise its supervisory powers to review this case.

CONCLUSION

For the reasons discussed in this brief, the Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 8th day of August.

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No. 97-68

In the
Supreme Court of the United States

OCTOBER TERM 1997

WESTOWNE SHOES, INC.
AND CARL A. BIWER CO.,

Petitioners,

v.

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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While predictably characterizing the court of appeals' decision as "thoughtful and careful," "well-reasoned" and "efficient," respondents ignore the Court's failure to address petitioners' primary breach of contract claim and its impermissible factfinding on a material, genuine issue. Instead, respondents attempt to continue in this court the same confusion that frustrated petitioners' jury trial and appeal rights below.

I. Independent of the Earlier, Underlying Dealership Agreement which the Court of Appeals Found Lacking in Specific Terms, the Critical 1987 Purity Agreement Not Addressed by the Court Was Specific in Its Terms and Established by Both the Writings and Statements of the Parties.

Respondents' brief in opposition, at page 9, asserts the court of appeals "explicitly addressed the Petitioners' contract law claims in its opinion and found them deficient." But the Court's opinion, including the portion quoted by respondents, shows the Court examined only the underlying dealership agreement, found it lacking in specific enforceable terms and held that under the dealership agreement, Brown was free to insist on "purity" as a condition for continuing as a Naturalizer dealer. That the Court mistakenly assumed Westowne's contract claim was based on an alleged wrongful imposition of purity is clearly shown by the court's own language:

> Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of losing its Naturalizer

> dealership (that is, the right to represent its stores as Naturalizer dealers) or replacing the SAS shoes that it carried with inferior knock-offs. . . . Westowne's argument is that the course of dealing between the parties, not any written contract, gave Westowne a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose unreasonable conditions on the retention of the dealership, such as requiring the dealer to carry a substandard product.

App. A at 3-4. The court acknowledged the imposition of purity combined with substandard product entitled Westowne to a remedy under the Wisconsin Fair Dealership Law (Wisconsin Statutes Chapter 135) and assumed because that remedy was time-barred, Westowne made its breach of contract claim as "a transparent evasion of the statute of limitations in the Dealership Act." App. A at 4.

If Brown had timely disclosed its inability to produce the SAS-type casual shoes and its decision to drop that product line, though continuing to insist on purity, Westowne would and would have pursued a Fair Dealership claim. App. J at 112. The fact Westowne had but did not pursue such a claim does not preclude a timely, common law breach of contract claim. Wisconsin's Fair Dealership law specifically provides that the rights thereunder are in addition to a dealer's remedies at common law. Wis. Stats. § 135.025(2)(c). The point of this petition, ignored by respondents, is that whether or not Westowne, like other dealers, had enforceable contract rights under their initial dealership agreements with Brown, there occurred in 1987 a specific contract modifying the earlier dealership agreement

which had permitted the dealers to sell casual shoes supplied by manufacturers other than Brown. In its June 11, 1987 "purity" letter, particularly as supplemented by its 1987 catalog, price list and buying guide and by specific oral statements from representatives of Brown management, Brown offered to produce and supply to Westowne, by a specific date in the following season, three identified styles of SAS-type comfort casual shoes in exchange for Westowne's agreement to eliminate from its inventory casual shoes manufactured by SAS by March 1, 1988. Both orally and by letter dated September 18, 1987, Westowne accepted this offer and agreed to eliminate its SAS shoes by the March 1, 1988 deadline, and to replace them with Naturalizer's Grenada, Russet and Utah series, the SAS-type comfort casuals Brown said it could and would supply. Westowne performed by eliminating SAS shoes. Brown did not perform. It could not and did not produce and supply a merchantable comfort casual shoe. While assuring Westowne and other dealers it was working out its problems, Brown decided to abandon its effort to produce the shoes and discontinued its comfort casual series. Still Brown insisted that Westowne remain "pure" as a condition for continuing as a Naturalizer dealer. App. J at 113-17.

The court of appeals acknowledged there were issues of fact on whether Brown promised Westowne and other dealers it would produce and supply SAS-type comfort casual shoes and whether it made good on that promise. App. A at 3. But the Court failed to address Brown's dropping the comfort casual line as a breach of contract because the Court did not address the contract alleged to have been breached. Instead of addressing petitioners' cause of action pleaded and pursued both in the district court and court of appeals (the breach of Brown's 1987 agreement to supply casual shoes in

exchange for Westowne's agreement to drop SAS shoes), the Court insisted petitioners were merely pursuing a claim over purity as a violation of the underlying dealership agreement which petitioners could have pursued earlier under the Wisconsin Fair Dealership Act, but cannot pursue as a matter of contract. Respondents' brief in opposition would continue into this court the confusion of plaintiffs' legitimate contract claim with an untimely claim under the Fair Dealership Act, thus continuing the frustration of petitioners' right to appeal on an issue properly raised and presented in the court of appeals.

Petitioners do not quarrel with respondents' argument and authorities in their brief in opposition at pages 10-11 that only significant and dispositive arguments on appeal must be addressed by the court. But one of petitioners' causes of action was based primarily on Brown's failure to supply casual shoes after promising Westowne it would do so in exchange for Westowne's agreement to go pure by eliminating SAS shoes. This claim was clearly alleged in the petitioners' complaint. App. I at 80-83, 85-87. In the court of appeals, petitioners raised, presented and developed as a primary appeal issue the district court's failure to recognize genuine, material issues of fact on this claim. App. K at 132-37, 147-53. Given the court of appeals' acknowledgement of the evidence Brown promised the SAS-type casual shoes, that Westowne then eliminated SAS shoes in favor of the Naturalizer versions it had been promised and that Brown did not supply the promised shoes, it is clear that had the Court addressed the mutual promises in 1987 as a separate contract, a contract which, under Wisconsin law, would be enforceable even in a dealership relationship

terminable at will,[1] the outcome of this case would have been different, at least in the sense that the evidence presented would have been regarded as requiring a trial so that summary judgment was not warranted.

II. The Court of Appeals' Finding, Contrary to the Record, that Westowne Would Have Eliminated SAS Shoes Even Without Brown's Promises and Misrepresentations, Constituted Impermissible Factfinding on Genuine, Material Issues.

Respondents' argument and authorities on this issue, brief in opposition at 12-17, demonstrate only the obvious: that issues of fact precluding summary judgment must be material and genuine and that in many instances the courts do reverse summary judgments. But respondents miss the point of the reason for granting certiorari related to this issue. Despite the proper application of summary judgment guidelines by some courts, there is a legitimate concern on the part of courts and writers that since this court's "1986 triology of summary judgment cases" there is a "drift in many areas of federal litigation toward substituting summary judgment for trial." *See* series of excerpts from court decisions and authorities cited in petition at 21-25.

The court of appeals' impermissible factfinding in this case illustrates the problem. Despite evidence in the record, cited by petitioners in the court of appeals, that Westowne would not have agreed to purity if it had known about

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[1] *See* authorities cited on this issue in Westowne's petition for rehearing in the court of appeals, App. L at 177-79.

Naturalizer's inability to produce a merchantable casual shoe (App. J at 112), the court of appeals found Westowne would have gone pure even in the absence of Brown's promises to supply an SAS substitute and even if Brown had disclosed its problems in producing them. It was based on this erroneous finding of fact that the Court concluded the acknowledged promises and misrepresentations "made no difference" and thus affirmed the dismissal of the promissory estoppel and misrepresentation claims. App. A at 6-7. From the court of appeals' own language, its factfinding was on a material issue. Petitioners' cited evidence Westowne would not have gone pure in the absence of Brown's promises and misrepresentations demonstrates the genuiness of that issue. This same evidence effectively replies to respondents' contention in their brief, at page 16, that the court of appeals' finding the promises and misrepresentations neither induced the petitioners to act nor caused them harm, was merely a "legal conclusion based upon the undisputed facts."

CONCLUSION

Certiorari should be granted to restore petitioners' jury trial and appeal rights and to discourage the deprivation of those rights in other cases.

Respectfully submitted,

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